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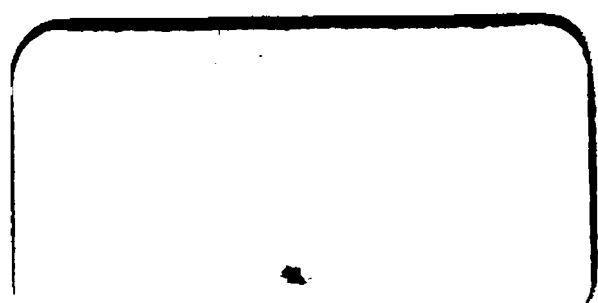
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THE MODERN
LAW OF RAILWAYS

AS DETERMINED BY
THE COURTS AND STATUTES OF ENGLAND
AND THE UNITED STATES.

BY
CHARLES FISK BEACH, JR.

OF THE NEW YORK BAR.

AUTHOR OF "COMMENTARIES ON THE LAW OF RECEIVERS,"
"THE LAW OF CONTRIBUTORY NEGLIGENCE," "WILLS," ETC.,
AND EDITOR OF "THE RAILWAY AND CORPORATION
LAW JOURNAL."

IN TWO VOLUMES.

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TO THE HONOURABLE
SIMON STERNE,
OF THE BAR OF THE CITY OF NEW YORK.

MY DEAR MR. STERNE:—

In placing your name upon the initial page of a work upon the American and English law of railways, I have at once gratified a sentiment and made a payment on account of a personal and professional obligation. I have also, as it seems to me, conformed at the same time in some sort to the fitness of things. My essay is, moreover, dignified by the superscription of a name peculiarly identified for all time to come with the history, development, and progress of the American railway. I know of no man here or abroad who knows more of the subject, or appreciates more keenly its difficulties, or comprehends more broadly the scheme, or divines more wisely the future. Counting your friendship among my most valued possessions,

I am, Sir, cordially and respectfully yours,

CHARLES F. BEACH, JR.

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PREFACE.

I HAVE proposed to myself in the preparation of these volumes the production of a work which shall supplement rather than supplant the other American and English treatises upon the subject. There is, perhaps, very little reason for the publication at this time of another conventional treatise on railway law; especial attention has, therefore, been given here to such branches of the general law of railways as seem to have been lightly or inadequately treated elsewhere. I have considered in much detail so much of the law of corporations as is applicable to railways, and I have endeavored to present fully the law of railway finance, including that of railway securities and the foreclosure of railway mortgages. The law of interstate commerce is, I believe, exhaustively set forth, and there is, in that connection, included a discussion of the several questions that have come prominently to the front since the enactment of the federal statute of February 4, 1887, entitled "An act to regulate commerce." The law of carriers, on the contrary, and

questions of injury and negligence, have been somewhat more lightly treated.

In a word, I have endeavored to present the whole law of railways, having, however, a due regard to what may be called its prospective, in giving prominence to live and novel phases of the subject. I have to this end, also, included very careful reference at every point to the English statutes and decisions—a matter hitherto wholly overlooked in American works on the subject—both because of the intrinsic value of what has been done in England toward the building up of a sound and stable system of railway law, and because there is in the United States among the thoughtful portion of our profession a growing concern about English decisions and statutes regarding the matter here in hand. Our railway system in America develops in general along somewhat the same lines already adjusted in the mother country, and things with us determine finally into their places much as they have done for our brethren in England. This interest in the British side of the problem may be expected to grow with the better sort of our lawyers and judges, and it has been both to anticipate and to foster this tendency that I have given such detailed attention to the statutes and decisions of a foreign jurisdiction.

In conclusion, I have made a work apt, I believe,

to prove useful to railway lawyers throughout the United States. It may also sometimes be found serviceable abroad. I have written into it whatever I have learned in my own practice as well as the learning of the decided cases. I know that I know what a railway lawyer needs; I think I have written what such a lawyer will use and value.

CHARLES F. BEACH, JR.

29, William Street, New York,

December 26, 1889.

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PART I.

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THE LAW OF RAILWAYS.

CHAPTER I.

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§ 1. **Definition and general considerations.**—A promoter is a person who brings about the incorporation and organization of a corporation. He brings together the persons who are interested in the enterprise, aids in procuring subscriptions, and generally is the representative of parties who wish to sell property to the corporation, or to construct its works.”¹ “As used in connection with companies, the term ‘promoter’ involves the idea of exertion for the purpose of getting up and starting a company (or what is called ‘floating’ it), and also the idea of some duty towards the company imposed by or arising from the position which the so-called promoter assumes toward it before it comes into existence.”² It is necessary in order to impose upon a person the liability of promoter that it be affirmatively shown to the court that he was acting in behalf of the projected corporation, or that he so held himself out, and that it was upon the faith of such acts or representations that the complainant dealt with him.³ But slight circumstances which indicate that a person is acting in his own interest, and not merely as an agent for others, are sufficient to impose upon him the fiduciary character of promoter.⁴ Those who subscribe the articles, or take stock in a company not yet incorporated, are not partners with those who assume the risk of acting for it.⁵ It has been said, however, that attendance at a meeting, announcement of being present and taking stock, and concurrence in measures for incorporation, may be strong evidence that a person “held himself out as a paymaster to all who executed the orders.”⁶

1 Cook on Stock and Stockholders, § 661.

2 Emma Silver M. Co. v. Lewis, 4 C. P. Div. 396.

3 St. Louis, F. S. & W. R. Co. v. Tiernan (1887), 37 Kan. 606. In this case it was held that merely signing the charter of the projected railway some time before it was filed with the Secretary of State does not place a person in a fiduciary position with respect to the corporation.

4 Lidney etc. Co. v. Bird, 31 Oh. Div. 328.

5 Ward v. Brigham, 117 Mass. 24.

6 Lake v. Argyle, 6 Q. B. 477.

§ 2. Of the fiduciary relation of promoters to the corporation.—A promoter occupies a fiduciary position with respect to the company, of such a character as incapacitates him from making a secret profit at the expense of the company.¹ The law forbids promoters to secretly derive any benefit over other stockholders, and renders them accountable to the company for any profit so derived.² They must inform their company of any profit acquired by them from the transaction, and deal with it, as it is said, “at arm’s length.”³ A corporation is entitled to the full benefit of all the contracts and agreements of persons assuming to act in the capacity of promoters, and may recover from them any secret profit acquired by them in the course of these transactions.⁴ A promoter who has distributed part of his secret profits among his co-promoters is not thereby relieved of liability to account to the corporation for the whole amount.⁵

1 Emma Silver M. Co. v. Grant, 11 Oh. Div. 918; Chandler v. Bacon, 30 Fed. Rep. 533.

2 Chandler v. Bacon, 30 Fed. Rep. 533, 540; Emery v. Parrott, 107 Mass. 95; Getty v. Devlin, 54 N. Y. 403; Densmore Oil Co. v. Densmore, 64 Pa. St. 43.

3 Emma Silver M. Co. v. Grant, 11 Ch. Div. 918.

4 Short v. Stevenson, 63 Pa. St. 95; Simons v. Vulcan Oil Co. 61 Pa. St. 232; Emma Silver Mining Co. v. Grant, 11 Ch. Div. 918; Bagnal v. Carlton, 6 Oh. Div. 371; Phosphate Sewage Co. v. Harmont, 5 Ch. Div. 334; New Sombrero Phosphate Co. v. Erlanger, 5 Ch. Div. 73; Hickens v. Congreve, 1 Russ. & M. 150; Beck v. Kantorowicz, 3 Kay & J. 230; 2 Lindley on Partnership, 580.

5 Getty v. Devlin, 70 N. Y. 504.

§ 3. A promoter may not accept a gift from a person dealing with the corporation.—If the vendors of property purchased by a corporation make any payment to a promoter thereof by way of commission or gift, he is liable to his company for the amount thus paid, less the amount of his disbursements in its behalf expended;¹ and he is not relieved of this liability by reason of the fact that the sale was a fair one.² If upon the discovery of the agreement between the promoter and vendors of property sold to the company, the gift or commission has not yet been paid, the corporation may recover it from the vendors.³

1 *Emma Silver M. Co. v. Grant*, 11 Ch. Div. 918.

2 *Emma Silver M. Co. v. Grant*, 11 Ch. Div. 918.

3 *Whaley Bridge etc. Co. v. Green*, 5 Q. B. Div. 109; *Bagnall v. Carlton*, 6 Ch. Div. 371; *St. Louis etc. Co. v. Jackson*, 5 Cent. L. J. 317; *In re Murvah etc. Co.* 24 W. B. 49.

§ 4. Under what circumstances a promoter may sell property to the corporation.—In cases in which the promoter has first purchased the property with that intention, and afterwards sells it to the company at an advance upon the original purchase-price, he may be compelled to make restitution to the corporation of the profit so acquired by him.¹ But a promoter may effect a valid sale of his own property to the corporation, provided the latter be fully cognizant of his interest therein. But if the corporation have no knowledge thereof, it may repudiate the contract, and, upon relinquishment of the property, recover the purchase-money.² If a person owning a piece of property becomes a promoter in a scheme of incorporation relating to the development of this prop-

erty, he may sell it to the corporation without reference to the original price paid by him therefor, on the hypothesis that when he acquired the property he did not act as promoter.³ Nevertheless, he may not sell at an unfair or exorbitant price, if at the time of the sale he occupies toward the corporation, as promoter or otherwise, a position of trust or confidence.⁴ In a case in which a person not acting as a promoter sold property to persons who were organizing a company, and afterwards united with them, and they together, as promoters, consummated a sale of the property to the company at a large advance, it was held that the original owner of the property, or his estate, he being dead, was entitled to retain the profit derived from the first sale, but must pay back his proportion of profit derived from the second.⁵

1 *Simons v. Vulcan Oil etc. Co.* 61 Pa. St. 202; 100 Am. Dec. 628; *McElhenny's Appeal*, 61 Pa. St. 188; *In re Hereford etc. Co.* 2 Ch. Div. 182; *Lichens v. Congreve*, 4 Russ. 562; *Bank of London v. Tyrrell*, 5 Jur. N. S. 924.

2 *New Sombrero etc. Co. v. Erlander*, 5 Ch. Div. 73, 103; 8 C. affirmed, 3 App. Cas. 1218; *Phosphate Sewage Co. v. Hartmont*, 5 Ch. Div. 394; *Lindsay Petroleum Co. v. Hurd*, Law R. 6 Com. P. 221.

3 *Taylor on Corporations*, § 83; *Densmore Oil Co. v. Densmore*, 64 Pa. St. 43, 49. *Cf. Grover's Case*, 1 Ch. Div. 182, where this question, although not directly involved, was fully discussed.

4 *Taylor on Corporations*, § 83.

5 *McElhenny's Appeal*, 61 Pa. St. 188.

§ 5. Of the personal liability of promoters.—

The promoters of a company prior to its incorporation stand in the position of agents of an undisclosed principal, and are personally liable upon all contracts entered into by them on behalf of the projected corporation. And if officers of a corporation sign a note on its behalf prior to its organi-

zation they incur thereby a personal liability.¹ If, however, the promoters have expressly stipulated that the contract shall be conditional upon the subsequent formation of a corporation, and upon its adoption of their agreement as its own, they will not, of course, be personally liable thereon.² And a promoter may show that by the terms under which he and the other members of a provisional committee consented to enter upon the work of organization, they were to incur no personal liability, and to have no power to bind one another.³ Even without such an express agreement, the mere fact that a promoter has consented to join a provisional committee, does not render him liable for the expenses incident to the work of the committee, such as printing, advertising, stationery, etc. In order that he may be bound, it is essential to show that the work was done, or the goods supplied under a contract with him or his authorized agent.⁴ An agreement to indemnify a provisional committee-man for all expenses incurred by him in the promotion of the scheme, does not embrace the costs of an action improperly brought against him as a member of the committee.⁵ A promoter can maintain a suit against his co-promoters only upon consenting that an account be taken of the expenses of all his associates.⁶

1 *Hurt v. Salisbury*, 55 Mo. 310; *Hopcroft v. Parker*, 16 Law T. N. S. 561.

2 *Landman v. Entwistle*, 7 Ex. 632; *Liggins v. Hopkins*, 3 Ex. 103; *Rennie v. Clarke*, 5 Ex. 292.

3 *Rennie v. Clarke*, 5 Ex. 292.

4 *Bailey v. Macaulay*, 15 Q. B. 533; *Raynell v. Lewis*, 15 Mees. & W. 517; *Wilson v. Curzon*, 15 Mees. & W. 532.

5 *Lewis v. Smith*, 19 Law J. Com. P. 278.

6 *Denton v. Macniel*, 2 Eq. 352.

§ 6. Consent of creditors necessary to relieve promoters of personal liability.—Although the company may assume the liabilities of its promoters, the latter are not thereby exonerated without the consent of the parties with whom they have contracted;¹ and without the consent of the creditors, even a charter providing that the company shall be solely liable, cannot relieve the promoters of their responsibility.² In a leading case in point,³ a company was projected for carrying on a hotel, and the promoters thereof signing “on behalf of” the company, contracted with the plaintiff for the purchase of certain goods. The goods were delivered to the representatives of the proposed company, and were consumed in its business. The company became incorporated, and ratified the agreement, but collapsed before the purchase-money was paid. It was decided that the promoters were personally liable for the price of the goods, that without the consent of the plaintiff no subsequent ratification by the company could relieve them of this liability, and that parol evidence was not admissible to prove that personal liability was not intended.⁴ When, however, the creditors have once given their consent, and the company has assumed the liabilities of its promoters, the latter will be exonerated.⁵ And where the person contracting with the promoters has agreed at the time not to hold them personally liable, consenting to look only to the funds of the company, and the latter proves to have no assets, he cannot maintain an action against the committee.⁶

¹ *Scott v. Ebury*, 33 Law J. Com. P. 161; *Kelner v. Baxter*, Law R. 2 Com. P. 174.

- 2 *Witmer v. Schlatter*, 2 Rawle, 353.
- 3 *Kelner v. Baxter*, Law R. 2 Com. P. 174.
- 4 *Kelner v. Baxter*, Law R. 2 Com. P. 174.
- 5 *Whitwell v. Warner*, 20 Vt. 425.
- 6 *Landman v. Entwistle*, 7 Ex. 632.

§ 7. The promoter's admissions as affecting his liability.—Admissions by a promoter to the effect that he was liable upon a certain contract are not conclusive evidence, where it is shown that he was ignorant of the liabilities legally attaching to him.¹ But in a case in which a promoter, in ignorance of the fact that his request to have his name withdrawn from the committee had been acceded to, made a payment upon the debts of the company, it was decided to be such a recognition of his liability as would warrant his name being placed upon the list of contributories.²

1 *Newton v. Belcher*, 12 Q. B. 921.

2 *Besley's Case*, 3 Macn. & G. 287; *Thompson on Liability of Officers and Agents*, 210. *Cf. Hole's Case*, 3 De Gex & S. 241.

§ 8. Promoters not ordinarily liable as partners. The several promoters of a corporation do not stand in the relation of partners to one another.¹ Consenting to act as a member of a provisional committee imposes upon the promoter none of the liabilities of partnership.² Such an association constitutes no agreement to share in profit and loss, which is the characteristic of partnership.³ "It would be absurd to suppose that such a relation could be meant to be created by any of those who consented to act."⁴ For a partnership is not created by an agreement to organize a partnership at some time in the future.⁵ And no promoter, in the absence of evidence that he has received au-

thority from the others to contract for them, can render them responsible for his acts.⁶ One who joins a provisional committee is not bound by contracts entered into by the committee prior to his admission, although the contracts are in part executed subsequently to that time.⁷

1 *Reynell v. Lewis*, 15 Mees. & W. 517; *Bailey v. Macaulay*, 13 Q. B. 815; 1 *Lindley on Partnership*, 31, 33.

2 *Reynell v. Lewis*, 15 Mees. & W. 517, 523.

3 *Reynell v. Lewis*, 15 Mees. & W. 517, 523.

4 *Reynell v. Lewis*, 15 Mees. & W. 517, 523.

5 1 *Lindley on Partnership*, 31; *Forrester v. Bell*, 10 L. R. C. L. 553.

6 *Patrick v. Reynolds*, 1 Com. B. N. S. 727; *Burbridge v. Morris*, 3 Hurl. & C. 634; *Wilson v. Curzon*, 5 Rail. C. 24; *Williams v. Pigott*, 5 Rail. C. 544; *Dawson v. Morrison*, 5 Rail. C. 62.

7 *Beale v. Mous*, 10 Q. B. 9 '6. *Cf. Whitehead v. Barron*, 2 Moody & R. 248; *Maudslayi v. Le Blanc*, 2 Car. & P. 400 n.; *Ex parte Jackson*, 1 Ves. Jr. 131; *Ex parte Peel*, 6 Ves. 602.

§ 9. Promoters may render themselves liable as partners.—But although consenting to act as a member of a provisional committee does not in itself impose upon the promoters the liabilities of partnership, yet the concurrence of other circumstances may be sufficient to render each of them liable upon contracts made by the others.¹ Thus they may incur liability as partners by holding themselves out as such, or negligently or fraudulently allowing themselves to be so represented by their co-promoters.² So again where promoters of a corporation had signed as parties of the second part a secret agreement with the owners of certain patents purchased in behalf of the projected corporation, and acted in concert for their own common benefit, it was held that whatever may have been their intention to the contrary they thereby became liable as partners.³ When the conduct of

parties operates as a fraud or deceit upon third persons, whatever their private intention, the relation of partnership may be said to exist between them with respect to such third persons.⁴ Likewise the fact that a committee-man attended and took part in a meeting at which a resolution incurring certain expenses was passed, will be sufficient to render him liable,⁵ unless it be proven that he dissented from the resolution, or that he had left the meeting before the adoption of the measure,⁶ or that he attended the meeting merely as a spectator, and took no part in its proceedings, and expressly requested that his name might not be inserted in the books of the company.⁷

1 *Landman v. Entwistle* 7 Ex. 632; *Reynell v. Lewis*, 15 Mees. & W. 517, 530; *Forrester v. Bell*, 10 L. R. C. L. 555; *Higgins v. Hopkins*, 3 Ex. 163; *Bailey v. Macaulay*, 13 Q. B. 814; *Newton v. Belcher*, 12 Q. B. 921; *Carrick's Case* 1 Sim. N. S. 505; *Ex parte Cottle*, 2 Macn. & G. 185; *Robert's Case*, 2 Macn. & G. 192; *Wood v. Argyll*, 6 Macn. & G. 928; *Purnside v. Dayrell* 3 Ex. 221; *Norris v. Cottle*, 2 H. L. Cas. 647, 665. *Contra* (but considered as overruled), *Holmes v. Higgins*, 1 Barn. & C. 74; *Lucas v. Beach*, 1 Man. & G. 417; *Hutton v. Uphill*, 2 H. L. Cas. 691.

2 *Taylor on Corporations*, § 77; *Collingwood v. Berkeley*, 15 Com. B. N. S. 145; *Maddick v. Marshall*, 17 Com. B. N. S. 829; *Wood v. Argyll*, 6 Man. & G. 928; *Lake v. Argyll*, 6 Q. B. 477.

3 *Chandler v. Bacon*, 30 Fed. Rep. 538.

4 *Chandler v. Bacon*, 30 Fed. Rep. 538; *Emery v. Parrott*, 107 Mass. 96; *Story on Partnership*, § 49.

5 *Craithwaite v. Skofield*, 9 Barn. & C. 401.

6 *Robert's Case*, 3 De Gex & S. 205; *Bealey's Case*, 3 De Gex & S. 224; *Thompson on Liability of Officers and Agents*, 208.

7 *Hall's Case*, 3 De Gex & S. 214.

§ 10. No presumption of the relation of principal and agent between promoters.—The mere fact that a person has agreed to become a member of the provisional committee of a projected railway company, amounts to no more than a promise that he will join with other members of the committee in promoting the scheme of organization, and the

law will not imply an authority from him to the other members of the committee to bind him by their contracts.¹ Where there is evidence that a promoter has acted with relation to the projected company, it is a question for the jury whether by his consent and acts he has authorized the secretary, solicitor or any member of the committee, to pledge his credit for the necessary expenses ordinarily incurred in the organization of companies of like character, and whether credit was given on the faith of his liability.²

¹ *Reynell v. Lewis* and *Wyld v. Hopkins*, reported together, 15 Mees. & W. 517.

² *Reynell v. Lewis*, 15 Mees. & W. 517; *Bailey v. Macanley*, 13 Q. B. 815.

§ 11. The same subject continued—The relation between provisional and acting committee-men. It has been customary in England, as the first step toward the organization of a railway company, for the persons interested in the enterprise to form what was known as a provisional committee. This committee in turn appointed an acting or managing committee, to whom the promotion and organization of the company was intrusted. When the scheme became abortive and there were no funds out of which to pay the expenses incurred by the managing committee, the question would arise whether the provisional or the managing committee should incur the liabilities of the debts contracted.¹ It was settled that the managing committee were not the agents of the provisional committee, but of the projected corporation; and that the provisional committee was not *ex vi termini* liable for the expenses incurred;² but that whether or no the provisional

committee had authorized the acting or managing committee to act as its agent and to pledge the credit of its members, was a question of fact for the jury.³

1 Thompson on Liability of Officers and Agents, 206.

2 Williams v. Pigott, 2 Ex. 201.

3 Williams v. Pigott, 2 Ex. 201.

§ 12. **Whether agency may be shown by a prospectus.**—Where there is evidence that a promoter has not only consented to be a provisional committee-man, but has authorized his name to be inserted in a particular prospectus in which certain persons are designated as the acting committee, solicitors, engineers and secretary, and this prospectus has been so publicly circulated, with the promoter's consent, that the jury would presume that the plaintiff knew of it and acted upon it, the question arises how far the promoter, as a provisional committee-man, may be rendered liable for the acts of the persons therein designated as the acting committee, solicitors, engineers and secretary.¹ This is a question for the jury, and must of course depend upon the terms of each particular prospectus.² If the prospectus state merely the names of the *provisional* committee and nothing more, and no light be derived from the context, that circumstance does not alter the liability of the promoter. "If not responsible as being one of that committee in fact, he cannot become so by the representation of the fact."³ But if the prospectus states the names of an *acting or managing* committee also, or of solicitors, secretaries, or other officers, it is for the jury to determine whether the

acting committee and other officers are to take upon themselves the whole management of the scheme, or whether the provisional committee has constituted the latter their agents to conduct it on their behalf.⁴

1 *Reynell v. Lewis*, 15 Mees. & W. 517, 530.

2 *Reynell v. Lewis*, 15 Mees. & W. 517, 530.

3 *Reynell v. Lewis*, 15 Mees. & W. 517, 530.

4 *Reynell v. Lewis*, 15 Mees. & W. 517, 530, 531.

§ 13. Of the liability of promoters to subscribers, when the scheme proves abortive.—If the scheme prove abortive, the expenses of its promotion fall upon the original projectors, and not upon those who have advanced their money upon the faith of its successful completion.¹ For persons who have purchased shares in a company which never comes into existence, have paid their money upon a consideration which has failed, and may recover it either at law,² or in equity,³ as money had and received.⁴ The whole amount thus advanced may be recovered from any member of the committee, unless it be shown that the subscriber has consented or acquiesced in the application of the deposit to the expenses of the undertaking,⁵ in which case the promoters cannot be held personally liable, if the money has been properly applied.⁶ Where there is an account to be taken of what has been properly applied toward the payment of expenses, a depositor may maintain an action against the committee, on behalf of himself and the other depositors;⁷ but where no accounting is prayed, the depositor can maintain the action only in his own name,⁸ unless, of course, there be

allegations of fraud.⁹ A promoter who was not a party to the proceedings resulting in applications for shares, cannot be held liable, although his name appears upon the prospectus as chairman.¹⁰

1 Nockels v. Crosby, 3 Barn. & C. 814, 822; Wallstab v. Spottiswoode, 15 Mees. & W. 501, 516.

2 Nockels v. Crosby, 3 Barn. & C. 814.

3 Grand Trunk R. Co. v. Brodie, 9 Hare, 822.

4 Ashpitel v. Sercombe, 5 Ex. 147; Ward v. Londesborough, 12 Com. B. 254; Colt v. Woolaston, 2 P. Wms. 153; Williams v. Page, 24 Beav. 654; Vollans v. Fletcher, 1 Ex. 20; Williams v. Salmond, 2 Kay & J. 463; Chapman v. Clarke, 4 Ex. 452.

5 Walstab v. Spottiswoode, 15 Mees & W. 501; Moore v. Garwood, 1 Law J. Ex. 15; Ashpitel v. Sercombe, 19 Law J. Ex. 82.

6 Garwood v. Ede, 17 Law J. Ex. 29; 1 Ex. 264; Clement v. Todd, 1 Ex. 263; Watts v. Salter, 10 Com. B. 476; Aldham v. Brown, 7 El. & B. 164; Londesborough v. Mowatt, 23 Law J. Q. B. 38, 177; 4 El. & B. 1; In re Dover, D. & C. P. R'y Co. 4 DeGex M. & G. 411; Millett v. Brown, 27 Law J. Ex. 256; 2 Hurl. & N. 837.

7 Apperly v. Page, 16 Law J. Ch. 100, 302; 1 Phill. Ch. 779.

8 Ship v. Crosskill, 10 Eq. Cas. Abr. 73; Stewart v. Austin, 3 Eq. Cas. Abr. 299; Denton v. Macniel, 2 Eq. Cas. Abr. 352; Mosely v. Cressey, Co. 1 Eq. Cas. Abr. 405.

9 Cridland v. Lord de Mauley, 1 De Gex & S. 459.

10 Burnside v. Dayrall, 19 Law J. Ex. 46.

§ 14. Whether the promoters are entitled to compensation from the company.—Inasmuch as a corporation is entitled to the benefit of contracts made by promoters in its behalf, it would seem no more than equitable that an agreement on the part of the corporation should be implied to indemnify the promoters for any expenses incurred by them in the furtherance of the scheme, or any liability therein incurred, at least in so far as the corporation may accept the benefit of the contracts.¹ But in the absence of any statutory provision, a company is bound by no implied promise to compensate its promoters for their services in furthering its organization.²

1 Taylor on Corporations, 85; Parsons v. Spooner, 5 Hare, 102.

² *Bell's Gap R. R. Co. v. Christy*, 79 Pa. St. 51; 21 Am. Rep. 39; *New York & N. H. R. R. Co. v. Ketchum*, 27 Conn. 171; *Hall v. Vermont & M. R. Co.* 28 Vt. 411; *Rockford, Rock Island & St. L. R. Co. v. Sage*, 65 Ill. 323; 16 Am. Rep. 587.

§ 15. Whether the promoters are entitled to compensation from each other.—Agreements between promoters to share expenses equally are valid and enforceable by any one of them who may in good faith have paid more than his share of the expenses of the scheme; but, in the absence of any special agreement, promoters are not entitled to remuneration from each other for their services in forwarding the organization of the corporation.¹ Where, however, several promoters have become jointly bound on one instrument and one of them is compelled to pay the whole amount of the debt, he is entitled to contribution from the others.² If some of the co-debtors be dead, the survivors are not bound to contribute more than would have been their proportion had there been no deaths.³

¹ *Taylor on Corporations*, § 81; ² *Lindley on Partnership* (4th ed.), 1022; *Pariss v. Fry*, 2 Craig & P. 311; *Boulton v. Peplow*, 3 Com. B. 493. *Cf. Holmes v. Higgins*, 1 Lar., & C. 71.

² *Batard v. Hawes*, 2 El. & B. 287; *Edger v. Knapp*, 7 Jur. 503.

³ *Batard v. Hawes*, 2 El. & B. 287.

§ 16. The same subject continued—The subscribers entitled to an equal division of the unexpended funds.—In returning to subscribers what remains of the advances made by them for the furtherance of a projected company which proves abortive, the managing committee cannot legally prefer one shareholder to another by treating his advances as a loan to be repaid in full, and paying to the others only their proportion of the amount remaining;¹ for a person who makes a colorable

subscription for shares in a company, simply for the purpose of deceiving others, with a secret agreement between himself and the managers that he shall not be liable as a subscriber, will, nevertheless, be held liable both in law and in equity.²

¹ Williams v. Page, 24 Beav. 654, 663; Clement v. Bowes, 1 Drew. 684, 688.

² Thompson on Liability of Officers and Agents, 214; Graff v. Pittsburg etc. R. R. Co. 31 Pa. St. 489; White Mountains R. R. Co. v. Eastman, 34 N. H. 134; Litchfield Bank v. Church, 29 Conn. 137, 150.

§ 17. How far the corporation is liable for the acts of its promoters.—Although the company cannot accept the benefits of a contract entered into on its behalf by its promoters without assuming also the burdens thereof,¹ yet as a general rule it is not bound by the contracts of its promoters nor responsible for their acts, except so far as it may have subsequently ratified them, either directly² or indirectly, as by the voluntary acceptance of the benefits arising therefrom,³ or by accepting a charter so requiring.⁴ For the promoters of a corporation have no authority to enter into preliminary contracts binding the corporation, when it shall come into existence. Such contracts bind only the individuals who make them. If, however, adopted by the corporation, and within the corporate powers, and not otherwise subject to objection, they may become the contracts of the corporation and enforceable against it.⁵ But promoters who, before the act of incorporation, enter into a contract which it would be *ultra vires* for the incorporated company to make, do not thereby bind the latter.⁶ In England it is provided by the Railways Construction Facilities Act of 1864,⁷ that contracts relative to the purchase or taking of lands

for the railway, entered into by the promoters before the incorporation, shall be as binding on the company as if they had been entered into by the company. According to the view of some of the cases, there can be no ratification of the contracts of its promoters by a corporation,⁸ considering any such apparent ratification as a new contract, or basing the liability of the corporation upon the grounds of equitable estoppel.⁹

1 *Gooday v. Colchester & S. V. R'y Co.* 15 Law R. Eq. 596; *Edwards v. Grand Junction R'y Co.* 1 Mylne & C. 650; *Preston v. Liverpool M. & N. J. R'y Co.* 7 Law R. Eq. 124.

2 *Payne v. New South Wales Coal Co.* 10 Ex. 283; *Wood v. Wheelen*, 93 Ill. 153; *Hutchinson v. Surry Gas Association*, 11 Com. B. 689; 1 *Lindley on Partnerships*, 395. Cf. *Burrows v. Smith*, 10 N. Y. 550.

3 *Little Rock & Fort Smith R. R. Co. v. Perry*, 37 Ark. 164; 9 Rail. C. 610; S. C. 44 Ark. 383; 25 Rail. C. 44, 50; *Boomer v. American Spiral Hinge Mfg. Co.* 81 N. Y. 468; *Despatch Line v. Bellamy Mfg. Co.* 12 N. H. 205; *Grape Sugar etc. Mfg. Co. v. Small*, 40 Md. 395; *Fister v. La Rue*, 15 Barb. 323. Cf. *Edwards v. The Grand Junction R. Co.* 1 Mylne & C. 650.

4 *Tilson v. Warwick Gaslight Co.* 4 Barn. & C. 962; *Shaw's Claim*, Law R. 10 Ch. 177. Cf. *Caledonian etc. R'y Co. v. Helensburgh*, 2 Macq. 395, 405, 407.

5 *Munson v. Syracuse, Geneva & Corning R. R. Co.* 103 N. Y. 58; *Doubleday v. Muskett*, 7 Bing. 110; *Money Penny v. Hartland*, 1 Car. & P. 352; *Kerridge v. Hesse*, 9 Car. & P. 200. As to whether a contract entered into with promoters of one company will be binding on an amalgamated company or on a rival company that has assumed the first company's liabilities, see *Stanley v. Chester etc. R'y Co.* 3 Mylne & C. 773; *Greenhalgh v. Manchester etc. R'y Co.* 9 Sim. 416; *Preston v. Liverpool, etc. R'y Co.* 1 Sim. N. S. 586; *Lindsey v. Great N. R'y Co.* 10 Hare, 664; *Hacker v. Mid Kent R'y Co.* 12 Law T. N. S. 699.

6 *Caledonian etc. R'y Co. v. Magistrates of St. Helensburgh*, 2 Macq. 391; *Shrewsbury v. N. Staffordshire R'y Co.* 1 Eq. Cas. Abr. 539. But see *Petre v. Eastern Counties R'y Co.* 1 Nic. H. & C. 462. This case, however, so far as it seems to hold to the contrary, is probably overruled.

7 27 & 28 Vict. ch. 121, § 30.

8 *Melhado v. Porto Alegre R'y Co.* Law R. 9 Com. P. 503; *Kilner v. Barter*, Law R. 2 Com. P. 174; *In re Empress Engineering Co.* 16 Ch. 125; *In re Northumberland Avenue Hotel*, 33 Ch. 16.

9 See cases cited *supra*, and *Touche v. Metropolitan R'y Warehousing Co.* 6 Ch. 671; *Lindsey v. Great N. R'y Co.* 10 Hare 664; *Edwards v. Grand Junction R'y Co.* 1 Mylne & C. 650; *Stanley v. Chester etc. R'y Co.* 3 Mylne & C. 773; *Bedford etc. R'y Co. v. Stanley*, 2 John. & H. 746.

§ 18. When the corporation may enforce the contracts of its promoters.—As long as the con-

tract remains executory between the promoters and the contracting party, it cannot be enforced against the corporation, in the absence of a ratification on its part; neither can the corporation enforce it against the other contracting party without fulfilling all the engagements entered into on its behalf by the promoters.¹ When, however, the corporation has ratified the contract and performed the obligations undertaken by the promoters, it may compel the other contracting party to comply with the terms of the agreement.²

1 Taylor on Corporations, § 90; *Burrows v. Smith*, 10 N. Y. 550.

2 *Bedford & C. R'y Co. v. Stanley*, 32 Law J. Ex. 60.

§ 19. Of contracts to quiet opposition to charter. In England contracts between the promoters of a company and persons opposing in parliament the granting of a charter, whereby, in consideration of the opposition being withdrawn, the promoters undertake that the projected corporation shall purchase certain property at a price greatly in excess of its fair valuation, or perform certain other acts for the benefit of its opponents, have been sustained, not only in equity,¹ but also at law,² in a long line of cases,³ which rest upon the authority of a decision of Lord Eldon's,⁴ in which he expressed an opinion to the effect that withdrawing opposition to a bill in parliament might be a good consideration for a contract. It has been decided that such agreements, although *ultra vires*, are not illegal, even when the land-owner, whose opposition has been bought off, is a member of parliament, unless it may be shown that the payment was made for the purpose of influencing his vote.⁵

Where the contract of the promoters is an absolute agreement on their part that the company will purchase certain lands if the vendor supports the bill and it becomes a law, the latter, having performed his part of the agreement, may hold the promoters liable in damages, if the company fails to take and pay for the land.⁶ But of course, under contracts by the terms of which the company is to take the property only in case it is needed in the construction, specific performance can be enforced only in that event.⁷

1 *Edwards v. Grand Junction R'y Co.* 1 Mylne & C. 650.

2 *Howden v. Simpson*, 1 Rail. C. 326; 1 Keen, 533; 3 Mylne & C. 95; 10 Ad. & E. 793; 3 Rail. C. 294; 9 Clark & F. 61.

3 *Doe v. London & C. R'y Co.* 1 Rail. C. 257; *Stanley v. Chester & B. R'y Co.* 1 Rail. C. 58; 9 Sim. 264; *Hawkes v. Eastern Counties R'y Co.* 1 DeGex M. & G. 737; 3 DeGex & S. 314; 15 Law R. Eq. 358; 4 Eng. L. & Eq. 91; *Cromford & H. P. R'y Co. v. Stockport D. & W. B. R'y Co.* 21 Beav. 74; *Petre v. Eastern Counties R'y Co.* 1 Rail. C. 462.

4 *Vauxhall Bridge Co. v. Spencer*, 2 Madd. 356.

5 *Preston v. Liverpool etc. R'y Co.* 5 H. L. Cas. 605; *Edwards v. Grand Junction R'y Co.* 1 Mylne & C. 650; *Stanley v. Chester etc. R'y Co.* 3 Mylne & C. 773; *Simpson v. Howden*, 9 Clark & F. 61; *Shrewsbury v. N. Staffordshire R'y Co.* 35 Law J. Ch. 156; *Petre v. Eastern Counties R'y Co.* 1 Nic. H. & C. 462; *Eastern Counties R'y Co. v. Hawkes*, 5 H. L. Cas. 321.

6 *Bland v. Crowley*, 6 Ex. 522; *Capper v. Lindsey*, 3 H. L. Cas. 293.

7 *Gage v. Newmarket R'y Co.* 18 Q. B. 457; *Preston v. Liverpool etc. R'y Co.* 5 H. L. Cas. 605; *Scottish N. E. R'y Co. v. Stewart*, 3 Macq. 382.

§ 20. Whether contracts to quiet opposition are in the nature of a bribe.—Although the courts have rather inclined to impart to such contracts the color of indemnification for injury to property or to the franchises of rival companies, than to regard them as bribes for the procurement of favor,¹ yet, there are cases in which, although by reason of the abandonment of the enterprise, no injury was ever sustained, the contracts to quiet opposition have been enforced.² In a later case, however, the lead-

ing cases cited above,³ “and other similar cases which have followed them,” although distinguishable from the case at bar, were pronounced “unsupported in principle.”⁴ And where the price has been so grossly in excess of the true value of the property that the court could not fail to perceive that it partook of the nature of a bribe, the contract has been declared *ultra vires* and specific performance denied.⁵ It has been held in England that a company already existing may validly contract that upon the passage of an act enabling it to build a new line, it will purchase certain property for the purposes of construction, whether the property be actually needed or no, and upon the passage of the act the contract may be specifically enforced.⁶ Such a contract, it is held, may be enforced after the compulsory powers of the company have terminated, as it is already in equity the owner of the land.⁷ In America there has been but little litigation involving the validity of contracts to quiet opposition. In New Hampshire the rule has been laid down that a contract, by which indemnity is guaranteed to a property holder, who merely for the protection of his private interest is opposing the bill in the legislature, is valid and may be enforced, unless it be shown that the legislature was misled and thereby induced to pass the act, when otherwise it would not have done so.⁸

1 Gage v. Newmarket R'y Co. 18 Q. B. 457; Porcher v. Gardner, 8 Com. B. 461.

2 Bradd v. Crowley, 6 Ex. 522; Shrewsbury & B. R'y Co. v. London & N. W. R'y Co. 3 Macn. & G. 70; Hawkes v. Eastern Counties R'y Co. 3 De Gex & S. 314.

3 Edwards v. Grand Junction R'y Co. and Petre v. Eastern Counties R'y Co.

4 Caledonian & D. J. R'y Co. v. Helensburgh Harbor Trustees, 2 Macq. 391; 39 Law R. Eq. 28.

5 *Preston v. Liverpool etc. R'y Co.* 5 H. L. Cas. 605.

6 *Eastern Counties R'y Co. v. Hawkes*, 5 H. L. Cas. 331; *Taylor v. Chichester etc. R'y Co.* Law R. 4 H. L. 628.

7 *Webb v. London & P. R'y Co.* 9 Hare, 140.

8 *Low v. Connecticut & P. R'y Co.* 46 N. H. 284; S. C. 45 N. H. 370.

§ 21. **Of petitions in equity to quiet opposition to charters.**—There are English cases which recognize it as within the jurisdiction of courts of equity under certain circumstances to restrain the opponents of a bill from petitioning parliament against its passage.¹ Under what circumstances this jurisdiction would be exercised does not appear from the decisions.²

1 *Stockton & H. R'y Co. v. Leeds & T. R'y Co.* 2 Phill. Ch. 666; *Heathcote v. North Staffordshire R'y Co.* 6 Ball. C. 358.

2 Cases cited *supra*, and *Steele v. North Metropolitan R'y Co.* Law R. 2 Ch. 237.

CHAPTER II.

CHARTERS AND GENERAL ENABLING ACTS.

- § 22. General considerations.
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- § 55. Of the consolidation of companies chartered in different States.
- § 56. The corporate name.
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- § 58. Of the duration of the corporation.

§ 22. General considerations.—The creation of a corporation is the bringing into being of an artificial person, with the capacity of receiving and enjoying other franchises and privileges and immunities.¹ The franchise conferring upon a corporation the right to exist, is complete within itself, and has no necessary connection with other franchises conferred by legislative grant.² The right of maintaining and operating a railway, and taking tolls, is not necessarily a corporate franchise. It might with perfect propriety be exercised by natural persons; and there is nothing in its nature which renders it unassignable.³ By the constitutions of some of the American States railroads are declared to be public highways;⁴ in others they are declared to be common carriers.⁵ By the constitution of Nebraska the liability of railways as common carriers can never be limited.⁶

1 Southern Pacific R. R. Co. v. Orton, 32 Fed. Rep. 457.

2 Southern Pacific R. R. Co. v. Orton, 32 Fed. Rep. 457.

3 Middlebury Bank v. Edgerton, 30 Vt. 182.

4 Stimson's Am. Stat. Law (1886), § 460, citing the constitutions of Pa., Ill., Neb., W. Va., Mo., Ark., Tex., Colo., Ala. and La. And free to all persons for the transportation of themselves and their property: Ill., Neb., W. Va., Ark. and Colo.

5 Stimson's Am. Stat. Law (1886), § 461, citing the constitutions of Pa., Mo., Ark., Tex., Cal., Colo., Ala. and La.

6 Neb. Const. (1875), art. 11, § 4.

§ 23. Railways as quasi-public corporations.—Railways may be considered either as public or as

private corporations according to the point of view from which they are regarded. In that they derive certain prerogative franchises from the sovereign power, such as the right of eminent domain and the right to levy tolls for the carriage of passengers and freight, in return for which concessions the State retains over them a power of supervision not exercised over strictly private corporations, they are to be considered as public corporations.¹ For these corporations are created and endowed with special privileges by the State, not with a view to promoting the private advantage of their stockholders, but in the interest of the public. Accordingly, in consideration of the franchises granted them, railways owe to the State and to its citizens certain duties, the non-performance of which renders them amenable to judicial control or liable to forfeiture of their charters.² Railways being chartered solely for the carriage of passengers and freight, are subject also to the common-law rules regulating common carriers, and are answerable for unreasonable refusal to transport the persons and goods of all comers;³ and for unjust discrimination in rates.⁴ On the other hand railways are private corporations in that they are built, owned and operated by private individuals, who by reason of their pecuniary interest therein and the privileges conferred upon them by their charters, acquire vested rights not subject to control by the State.⁵ A corporation does not lose its private character by reason of the State or the United States owning a part of its shares. Although of course where the State is the owner of all the stock, the company is a public corporation, yet so long as any portion of its stock is

owned by a private person, it is in the sense above explained private in its nature.⁶

1 *State v. Boston etc. R. R. Co.* 25 Vt. 433.

2 *Newburyport Turnpike Co. v. Eastern R. R. Co.* 23 Pick. 326; *Worcester v. Western R. R. Co.* 4 Met. 564.

3 *Chicago R. R. Co. v. The People*, 67 Ill. 11.

4 *McDuffee v. Portland R. R. Co.* 52 N. H. 430; 13 Am. Rep. 72; *Chicago B. & Q. R. R. v. Parks*, 18 Ill. 460; 58 Am. Dec. 362; *Vincent v. Chicago R. R. Co.* 49 Ill. Co. 33; *People v. Chicago R. R. Co.* 55 Ill. 96; 8 Am. Rep. 631; *Ormsby v. Union Pacific R. R. Co.* 2 McCord C. C. 48.

5 *Price v. Commonwealth*, 104 Pa. St. 150; *Donnaher v. Mississippi*, 8 Sm. d. & M. 649, 661; *Rundle v. Delaware & R. Canal Co.* 1 Wall. Jr. 275; *Waterloo Presbyterian Soc. v. Auburn & R. R'y Co.* 3 Hill, 570; *Dearborn v. Boston C. & M. R'y Co.* 4 Fost. (N. H.) 179, 190; *Thorpe v. Rutland & B. R. R. Co.* 27 Vt. 140; 62 Am. Dec. 625; *Ohio etc. R. R. Co. v. Ridge*, 5 Blackf. 78; *Bonaparte v. Camden & A. R. R. Co.* 1 Bald. 235, 222; *Raleigh & G. R. R. Co. v. Davis*, 2 Dev. & B. 451.

6 *Moore v. Schopper*, 22 W. Va. 282; *Marshall v. Western R. R. Co.* 92 N. C. 322; *Sayre v. North Western Turnpike Co.* 10 Leigh, 451. Cf. *Bradley v. New York & N. H. R'y Co.* 21 Conn. 294, 304, 305.

§ 24. **By what authority railway corporations are created.**—Railway companies, like all other corporations, derive their existence and all their powers from the sovereign authority of the State.¹ or from the authority granted by the States to the federal government.² This authority may be conferred either by special legislative grant, or by general laws authorizing their creation. The power of Congress to charter such companies as are necessary to carry out the powers delegated to the federal government, was first declared in the great case of *McCullough v. Maryland*,³ by Chief Justice Marshall. In recent years the power has been freely exercised.⁴ And Congress may create railway companies in territory under its exclusive control.⁵ But it is not within the power of a United States court to create a railway corporation, nor to review the action of a State legislature granting or refusing such a franchise.⁶ A railway

corporation cannot be created by implication, but only by express legislative enactment.⁷

1 Ernst v. Bartle, 1 John. (N. Y.) Cas. 319; 1 Wood on Railways, 4.

2 McCullough v. Maryland, 4 Wheat. 316; Thomson v. Pacific R. R. Co. 9 Wall. 579; Osborne v. Bank, 9 Wheat. 73; Pacific R. R. Co. v. Lincoln Co. 1 Dill. 314.

3 4 Wheat. 316.

4 Osborn v. Bank of the United States, 9 Wheat. 738; Thompson v. Pacific R. R. Co. 9 Wall. 579; Farmers' etc. National Bank v. Dearing, 91 U. S. 23; Williams v. Cresswell, 51 Miss. 817; Hadley v. Freedman's Savings Bank, 2 Tenn. Ch. 122.

5 Thomas v. Pacific R. R. Co. 9 Wall. 579; California v. Pacific R. R. Co. 127 U. S. 33; Story on the Constitution, § 1266; "National Corporations," 21 Cent. L. J. 428.

6 Trust Co. v. Brady, 20 Barb. 119.

7 Pennsylvania R. R. Co. v. The Canal Co. 21 Pa. St. 9; Tennessee R. R. Co. v. Adams, 3 Head, 596; Camden etc. R. Co. v. Briggs, 29 N. J. 623; Wright v. Briggs, 2 Hill, 77. Acc. State v. Bradford, 32 Vt. 50; Stowe v. Flagge, 72 Ill. 397.

§ 25. Of *de facto* corporations.—Where there is a colorable compliance with the provisions of a charter or general incorporation law and a user of the rights claimed thereunder, it is sufficient to constitute a *de facto* 'corporation.'¹ A company that has exercised and claimed the powers of a corporation will not be heard to deny its corporate existence.² And on the other hand, proof of *de facto* corporate existence is sufficient on an issue of *nul tiel* corporation.³ For the regularity of the organization of a *de facto* corporation is not to be questioned collaterally in a suit between it and a private person.⁴ Accordingly a person who has contracted with such a corporation cannot deny its incorporation for the purpose of holding its members liable as partners,⁵ or to evade liability upon contracts which he has made with it.⁶

1 Stout v. Zulick (1887), 48 N. J. 599.

2 Callender v. Painesville & H. R. R. Co. 11 Ohio St. 516; Atlantic & Q. R. R. Co. v. Sullivant, 5 Ohio St. 276; Ashtabula & N. L. R. R. Co. v.

Smith, 15 Ohio St. 328; Aultman v. Waddle (Kan. 1888), 19 Pac. Rep. 730; McDonnell v. Alabama Gold Life Ins. Co. 85 Ala. 401.

3 Hubbard v. Chappel, 14 Ind. 621.

4 East Norway L. N. E. L. Church v. Froisalle (Minn. 1837), N. W. Rep. 260.

5 Fresno Canal & I. Co. v. Warner (1887), 72 Cal. 373. Unless there be a statute rendering the shareholders individually liable for failure to comply with the charter or act of incorporation: Stout v. Zulick (1887), 43 N. J. 599.

6 Fresno Canal etc. Co. v. Warner, 72 Cal. 379.

§ 26. The corporate existence and franchise not to be questioned collaterally. — There can be no collateral inquiry into the right of a corporation to exercise its franchises.¹ Whether a corporation has violated its charter by misuse or abuse of its corporate franchise, or by usurpation of powers, is a question between it and the State alone, to be inquired into on a direct proceeding for that purpose.² A *quo warrantò* by the State is the only method of questioning the *de jure* existence of a corporation which is acting under color of law.³ Likewise, the right of a railway to hold lands beyond the amount necessary to the maintenance and operation of its road is a question between it and the State alone.⁴ The rule that the legal existence of a corporation *de facto* can be inquired into only by the State, applies as well to those claiming to be created under general incorporation laws as to those claiming to derive their franchise from a special charter.⁵ The title to property, conveyed by a corporation defectively organized, can only be passed by a deed executed jointly by all the shareholders.⁶

1 Weaverville & Minersville Wagon Road Co. v. Trinity County Supervisors, 64 Cal. 69.

2 Southern Pacific R. R. Co. v. Orton, 32 Fed. Rep. 457, 471; Schulenberg v. Harriman, 21 Wall. 62. *Vide infra*, §§ 589, 590.

3 Catholic Church v. Tobbein, 82 Mo. 418.

4 Russell v. Texas & P. R'y Co. (1887), 68 Tex. 646; Southern Pa-

cific R. R. Co. v. Orton, 32 Fed. Rep. 457, 470, 471; Railroad Co. v. Proctor, 29 Vt. 93; Bissell v. Railroad Co. 22 N. Y. 259; Cowell v. Springs Co. 100 U. S. 60, 61; Christian Union v. Yount, 101 U. S. 361. Cf. Hickory Farm Oil Co. v. Buffalo, N. Y. & P. R. Co. 32 Fed. Rep. 22.

5 Stout v. Zulick (1887), 48 N. J. 399.

6 Hincks v. Converse, 37 La. An. 484.

§ 27. **Of the charter.**—The charter of a corporation is the source from which must be gathered its character and purposes.¹ The charter of a corporation having capital stock is a contract between three parties, the State, the corporation, and the stockholders.² It is first a contract between the corporation and the shareholders.³ The shareholder subjects his interest to the control of the proper authorities to accomplish the object of the organization, and on the other hand it is understood and agreed that the purpose of the corporation shall not be changed in its character at the will of the directors or even by a majority of the stockholders, without the consent of both contracting parties.⁴ Any attempt on the part of the corporation to make such a change, extension or alteration constitutes an *ultra vires* act against which any single shareholder has his remedy in equity.⁵ That the charter is a contract between the State and the corporation, the obligation of which cannot be impaired by any law of the State,⁶ has been so long acquiesced in by the American courts, that they are, as has been said, estopped from denying the soundness of the doctrine. In England, however, the power and jurisdiction of parliament is so transcendental and absolute that it cannot be controlled or confined within any bounds, and consequently the rule is different.⁷ The charter is also a contract between the State and the shareholders,

and when once accepted by the latter cannot be repealed nor amended without their unanimous consent, unless, of course, that power has been reserved by the State.⁸ Any attempt on the part of the legislature to repeal or forfeit the charter may be resisted and prevented by the stockholders;⁹ for forfeiture can only be effected by judicial proceedings¹⁰

1 Nicholson's Succession, 37 La. An. 346.

2 Cook on Stock etc. § 492; Cooley on Constitutional Limitations (5th ed.), § 337; Northern R. R. Co. v. Miller, 10 Barb. 260.

3 Livingston v. Lynch, 4 Johns. Ch. 573; Natusch v. Irving, per Eldon, reported in Gow on Partnership.

4 Clearwater v. Meredith, 1 Wall. 25.

5 Cook on Stock etc. § 493.

6 U. S. Const.; Dartmouth College v. Woodward, 4 Wheat. 518, per Marshall, C. J.; Thorpe v. Rutland & B. R. Co., 27 Vt. 140; 62 Am. Dec. 625.

7 Cook on Stock etc. § 494, n.

8 Delaware R. R. Tax, 18 Wall. 206; Wilmington R. R. v. Reid, 13 Wall. 264; Erie & N. E. R. R. Co. v. Casey, 26 Pa. St. 287; Zabriskie v. Hackinsack & N. Y. R. R. Co. 18 N. J. Eq. 178; 90 Am. Dec. 617; Stevens v. Rutland & B. R. Co. 29 Vt. 545.

9 Greenwood v. Freight Co. 105 U. S. 13; Erie & N. E. R. R. Co. v. Casey, 26 Pa. St. 287.

10 Allen v. Buchanan, 9 Phila. 283. *Vide infra*, § 592.

§ 28. Of acceptance of the charter.—The charter of a private corporation being in the nature of a contract, can have no binding force nor effect until accepted by the persons composing the company.¹ It is this concurrence and acceptance that gives force to the charter.² The State cannot enforce the acceptance of a charter upon a private corporation without its consent, for no corporator shall be subject to the inconveniences thereof without his assent.³ “That a man may refuse a grant, whether from the government or an individual, seems to be a principle too clear to require the sup-

port of authorities."¹ An application for a charter raises a presumption of an acceptance of it.⁵ A corporation chartered in one State cannot make a valid acceptance of the charter at a meeting held in another State.⁶

¹ Angell & Ames on Corporations, § 31-36, 81; *Falconer v. Campbell*, 2 McLean, 196.

² *Rex v. Vice-Chancellor of Cambridge*, 3 Burr. 1661; *Shortz v. Unangst*, 2 Watts & S. 45.

³ *Bailey v. Mayor of New York*, 3 Hill, 531; 38 Am. Dec. 669; *King v. Pasmore*, 3 Term Rep. 240; Angell & Ames on Corporations, § 81.

⁴ *Ellis v. Marshall*, 2 Mass. 269; 3 Am. Dec. 49.

⁵ *Atlanta v. Gate City Gas Light Co.* 71 Ga. 106.

⁶ *Smith v. Silver Valley Mining Co.* 64 Md. 85; 54 Am. Rep. 760. See further respecting the place of corporate meetings, §§ 43, 43; *infra*.

§ 29. **Charters strictly construed.**—The charters of corporations are to be strictly construed against the corporation and in favor of the public;¹ for the charter taken in conjunction with the general laws of the State affecting corporations, is the full measure of their rights and privileges. No power not conferred therein by express and unequivocal words can be presumed to have been included in the grant,² except such as are necessarily incident and requisite to the exercise and enjoyment of the rights and privileges expressly granted and without which the object for which the corporation was created would be defeated.³ An exclusive privilege to operate a horse-railway does not embrace the right to use any other subsequently invented means of locomotion nor debar the grantor from chartering a cable-tramway company within the same territory.⁴ A corporation chartered as a steam-railway company and a horse-railway company cannot be estopped by having enjoyed benefits under a city ordinance regarding it as the latter, from

subsequently claiming its original right to use steam motive power.⁵

1 *Thomas v. Railroad*, 101 U. S. 71, 82; *Pennsylvania R. R. Co. v. St. Louis etc. R. R. Co.* 118 U. S. 290; *Florida etc. R. R. Co. v. Pensacola etc. R. R. Co.* 10 Fla. 145; *Pennsylvania R. R. Co. v. Canal Commissioners*, 21 Pa. St. 9; *Camden & Amboy R. R. Co. v. Briggs*, 22 N. J. 623; *Parker v. Great Western R. R. Co.* 7 Mau. & G. 253; *Macon etc. R. R. Co. v. Davis*, 13 Ga. 68; *Macon v. Macon etc. R. R. Co.* 7 Ga. 231; *Stockton etc. R'y Co. v. Barrett*, 11 Clark & F. 590; *Badley v. New York & N. H. R. R. Co.* 21 Conn. 245; *Davis v. Old Colony R. R. Co.* 131 Mass. 253; 41 Am. Rep. 271. *Per contra*, it has been said that the charter of a corporation should not be strictly construed; that a substantial compliance with its requirements is sufficient: *People v. Stockton R. R. Co.* 45 Cal. 306; 13 Am. Rep. 178; *Walworth v. Brackett*, 98 Mass. 98; *People v. Cheesman*, 7 Col. 376. So, authority to build a railway "from the city of Chicago to any point in the town of Evanston" has been construed to mean from any point in the city of Chicago: *Chicago & N. R'y Co. v. Chicago & Erie R. R. Co.* 112 Ill. 589; *McCartney v. Chicago & E. R. R. Co.* 112 Ill. 611.

2 *Tennessee etc. R. R. Co. v. Adams*, 3 Head. (Tenn.) 596; *Commonwealth v. Erie & N. E. R. R. Co.* 27 Pa. St. 339; 67 Am. Dec. 471; and cases cited *supra*, n. 1.

3 *Thomas v. Railroad*, 101 U. S. 71; *Davis v. Old Colony R. R. Co.* 131 Mass. 258; 41 Am. Rep. 221; *Enfield Toll Bridge Co. v. Hartford R. R. Co.* 17 Conn. 454; 44 Am. Dec. 556; *Boston Water Power Co. v. Worcester R. R. Co.* 23 Pick. 360; *Atty.-Gen. v. Great Eastern R'y Co.* 5 Law R. App. C. 473.

4 *Omaha Horse R'y Co. vs. Cable Tramway Co.* 30 Fed. Rep. 324.

5 *McCartney v. Chicago & E. R. R. Co.* 112 Ill. 611.

§ 30. Of powers necessarily implied.—As stated in the foregoing section, there may be an implied grant of powers not expressly conferred by the charter or act of incorporation, where, without such an implication, the object for which the corporation was created would be defeated. For example, from the express authority to build a railway from one place to another, is to be inferred by necessary implication the right to condemn lands for that purpose;¹ to appropriate gravel and earth for construction of the road-bed, land for necessary appurtenances, and water for engines; to run cars, and to take tolls;² to erect bridges over navigable streams;³ to locate the route on or along a highway,⁴ or on lands belonging to other railways;⁵

provided always that without so doing, the powers expressly conferred would be nugatory.⁶ So also express authority to build a bridge implies authority to build the necessary approaches,⁷ and to take lands for abutments, upon compensating the owners thereof.⁸ And the grant of a power to bridge a navigable stream necessarily implies the right to repair the bridge.⁹

1 Tennessee etc. R. R. Co. v. Adams, 3 Head (Tenn.), 596.

2 Morgan v. Louisiana, 93 U. S. 217; Lawrence v. Morgan's La. & T. R. & S. S. Co. (La. 1887), 2 South. Law Rev. 69.

3 Tennessee etc. R. R. Co. v. Adams, 3 Head, 595; Fall River I. W. Co. v. Old Colony etc. R. R. Co., 5 Allen, 221.

4 Springfield v. Connecticut River R. R. Co. 4 Cush. 63.

5 Housatonic R. R. Co. v. Lee etc. R. R. Co. 118 Mass. 391.

6 Cases cited *supra*.

7 Slatern v. Des Moines etc. R. R. Co. 29 Iowa, 148; 4 Am. Rep. 205.

8 Linton v. Sharpsburgh Bridge, 1 Grant's Cas. (Pa.) 414.

9 Central Trust Co. v. Wabash, St. L. & P. R'y Co. 32 Fed. Rep. 566.

§ 31. **Of conditions annexed to charters.**—The charter of a railway company may be granted conditionally, as, for example, upon the consent of a city to the exercise of the franchise, in which case that consent will be a condition precedent to the building of the road.¹ The conditions most frequently imposed are with respect to subscription to the capital stock, and the payment of the whole or a part of the amount due upon the shares. Although such requirements are, in the nature of conditions precedent, and as such must be strictly complied with before business may be begun,² and it is necessary that the subscriptions should have been made *bona fide* by persons having a reasonable expectation that they would be able to pay,³ yet they are not enforced with unreasonable exactness.

A substantial compliance will suffice. Thus a corporation may show a substantial compliance with a requirement that one half its capital stock must be actually paid in money, by proving the receipt by it of property, the value of which in the market exceeds the par value of the stock.⁴ And where it is required in incorporation that one half of the par value of the stock shall be "actually paid up in lawful money of the United States," it suffices if goods are put in on which money to that amount may be realized.⁵ So a statutory requirement that a specific sum be deposited with the State treasurer by a corporation, before land shall be taken, is sufficiently complied with by a deposit of United States bonds, in the absence of specification that the deposit be in money.⁶

1 *People's Pass. R. R. Co. v. Memphis R. R. Co.* 10 Wall. 38.

2 *People v. National Savings Bank* (Ill. 1887), 11 N. E. Rep. 170; *Bend v. Susquehanna Bridge Co.* 6 Har. & J. 128; 14 Am. Dec. 261.

3 *Holman v. State*, 135 Ind. 563.

4 *State v. Wood*, 84 Mo. 378.

5 *State v. Wood*, 13 Mo. App. 139.

6 *Briggs v. Cape Cod Ship Canal Co.* 137 Mass. 71.

§ 32. Special charters prohibited in many States.—By the constitutions of most of the States of the American union the legislature is forbidden with certain exceptions to create corporations by special act.¹ In Georgia, railway companies are mentioned among the exceptions.² Accordingly, in these States railway corporations are created under general incorporation laws, varying in details, but substantially similar to the New York general railroad act of 1850. In England also the Railway Construction Facilities Act³ has relieved the promoters of railways from the onerous expenses and

vexatious delays incident to the procurement of special acts of incorporation from Parliament.⁴

1 Stimson Am. Stat. Law (1886), § 441, citing the constitutions of Me., N. Y., N. J., Ohio, Ind., Ill., Mich., Wis., Iowa, Minn., Kans., Neb., Md., W. Va., N. C., Tenn., Mo., Ark., Tex., Cal., Or., Nev., Colo., Ala., La. See also U. S. Rev. Stat. § 188⁴; St. Paul Fire Ins. Co. v. Allis, 24 Minn. 75; San Francisco v. Spring Valley Water Works, 48 Cal. 4.3; Wallace v. Loomis, 97 U. S. 146; Callaway County v. Foster, 93 U. S. 570. The exceptions mentioned in the text are variously made in the several States, with respect to municipal corporations, or charitable, educational and reformatory corporations; industrial, manufacturing, mining and banking corporations; corporations for encouraging immigration, for improving rivers and harbors, and for building canals, and for other special purposes. See Stimson's Am. Stat. Law (1886), § 441, where the details of these provisions are given at length and with great care.

2 Ga. Const. (1877), art. 3, §§ 7, 18. See also U. S. Rev. Stat. 1889. In Florida "other useful companies" are excepted: Fla. Const. art. 4, § 22.

3 27 and 28 Vict. ch. 121.

4 *Vide infra*, § 39.

§ 33. Of general incorporation laws.—As a general rule under these incorporation laws, a proposed corporation does not come into existence until every formality required in the statute has been complied with.¹ It would seem, however, that a substantial, rather than a technical compliance with the provisions of the act will suffice.² Thus it has been held that so slight an irregularity, in following out the steps necessary to create a corporation, as a failure by the notary to certify a personal knowledge by him of those signing the articles of incorporation, is not fatal.³ And although the vital and final act, by which a corporation is endowed with life and franchises, is the recording of the certificate with the county recorder,⁴ this requirement is sufficiently complied with so far as the corporation is concerned by filing the articles of association with the proper officer.⁵ A corporation organized under a general law dates its existence from the time of filing its articles of association or

charter, and it is not a condition precedent to the transaction of business that all the capital stock be subscribed for.⁶ The provisions of a charter of a corporation, which are similar in terms to the provisions of a general act, will be regarded as substituted therefor, when the charter prescribes that the corporation shall be subject to such provisions of the general act as are applicable.⁷

¹ *Burt v. Farrar*, 24 Barb. 518; *Heinig v. Adams & Westlake Mfg. Co.* 81 Ky. 300.

² *State v. Wood*, 84 Mo. 378.

³ *People v. Cheeseman*, 7 Cal. 376.

⁴ *Creaswell v. Oberly*, 17 Ill. App. 281.

⁵ *Walton v. Riley*, (1887) 85 Ky. 413.

⁶ *Chicago K. & W. R. Co. v. Putnam* (1887), 12 Kan. 121.

⁷ *Briggs v. Cape Cod Ship Canal Co* 137 Mass. 71.

§ 34. **Incorporation under the general railroad act of New York.**—Under the general railroad act of New York,¹ any number of persons not less than twenty-five may, by filing articles of association with the Secretary of State, become incorporated without a special charter from the legislature. The corporation so organized may construct, maintain and operate a railroad for public use in the conveyance of persons and property, or for the purpose of maintaining and operating any unincorporated railroad already constructed for the like public use, and shall be a corporation by the name specified in the articles of association, and shall possess the powers and privileges of corporations, and be subject to the provisions concerning them in the revised statutes of the State.² The articles of association are to be filed with the Secretary of State, who shall indorse thereon the day of filing and make record thereof in a book provided

for that purpose; and thereupon the subscribers to the articles and all persons who shall become stockholders in the company are constituted a corporation.³

1 N. Y. Laws 1850, ch. 140.

2 The provisions referred to are contained in N. Y. Rev. Stat. pt. 1, tit. 3, ch. 18, "except the provisions contained in the 7th section of said title": General Railroad Act, N. Y. Laws 1850, ch. 140, § 1.

3 N. Y. Laws 1850, ch. 140, § 1.

§ 35. Powers conferred by the general railroad act of New York.—Every corporation formed under this act, in addition to the powers granted to corporations generally,¹ has power to enter upon land for purposes of survey; to hold voluntary grants of real estate; to purchase, hold, and use such real estate and other property as may be necessary for the construction and maintenance of its railroad and the stations and other accommodations necessary to accomplish the objects of its incorporation; to lay out its road, not exceeding six rods in width, and to construct the same; for the purpose of cuttings and embankments, to take as much more land as may be necessary; to cut down any standing trees that may be in danger of falling upon the road; to construct the road across any stream, canal and highway, or other railway, to carry persons and property, and receive compensation therefor; to use either steam, or animals, or any mechanical power; to erect buildings necessary for the use of passengers, freight and business; to regulate the time and manner of transportation, and charges for passengers and baggage within the limit of three cents a mile; to borrow money necessary for the completion or

operation of the road, and to mortgage the corporate property and franchises to secure the payment thereof.²

1 In N. Y. Rev. Stat. pt. 1, tit. 3, ch. 18.

2 N. Y. Laws of 1850, ch. 140, § 23.

§ 36. The articles of association under the New York act—What to contain.—The articles of association shall state the name of the company; the number of years it is to continue; the *termini* of the road; its length as near as may be; the name of each county in the State through or into which it is intended to be made; the amount of the capital stock, which must not be less than ten thousand dollars for each mile of the road; the number of shares of which the capital stock is to consist; the names and places of residence of thirteen directors of the company, who shall manage its affairs for the first year or until others are chosen in their places. Each subscriber to the articles of association shall subscribe his name, his place of residence, and the number of shares he agrees to take.¹

1 N. Y. Laws 1850, ch. 140, § 1.

§ 37. Defective articles under the New York act—How cured.—Where the names and residences of the thirteen directors have been omitted from the articles of association as originally made and signed, provision has been made for their subsequent insertion.¹ And the directors of any corporation organized under any general act for the formation of companies, in whose original certificate of incorporation any informality may exist by

reason of an omission of any matter required to be stated therein, are authorized to make and file amended certificates of incorporation to conform to the general act under which the corporation is organized; and upon their so doing the company is for all purposes deemed and taken to be a corporation from the time of filing the original certificate;² with the proviso, however, that nothing in the act shall in any manner affect any suit or proceeding pending against the corporation at the time of filing the amended certificate, or impair any rights already accrued.³

1 N. Y. Laws of 1872, ch. 829, § 1.

2 N. Y. Laws of 1870, ch. 135, § 1.

3 N. Y. Laws of 1870, ch. 135, § 2.

§ 38. Conditions precedent to incorporation under the New York act.—But the articles of association are not to be filed and recorded in the office of the Secretary of State, until at least one thousand dollars of stock for every mile of railroad proposed to be made is subscribed, and ten per centum thereon paid in good faith, and in cash, to the directors named in the articles of association; and affidavit must be made by at least three of the directors, that these conditions have been complied with and that it is intended in good faith to construct or maintain and operate the road mentioned in the articles of association.¹ Provision is made, however, in the case of a road between two points in the State which may be partly located in an adjoining State, for a reduction of the capital stock specified in the articles of association, to the amount which would be required by law for the number of miles actually constructed in the State.²

1 N. Y. Laws, 1850, ch. 140, § 2.

2 N. Y. Laws, 1851, ch. 19, § 2

§ 89. **The English Railways Construction Facilities Act.**—The English Railways Construction Facilities act,¹ after reciting the expediency of facilitating railway construction, where all the landowners and parties concerned have consented, by the passage of a general act granting the necessary powers to the persons interested without their being obliged to procure a special act of Parliament, provides, that after the promoters have contracted for the purchase of all the lands required for the railway, they shall apply to the board of trade for a certificate, depositing with the board maps, plans, books of reference, estimates, etc., and a draft of the certificate as proposed by them, and publish notice of the application; that the board of trade shall then prepare a draft certificate to the effect that the company of persons therein specified are authorized to make the railway therein described; that this draft certificate shall then be laid before both houses of Parliament; that if either house resolve that the certificate ought not to be made, the matter shall not be proceeded with further; that if it be not so resolved by either house within six weeks, the board of trade may make and issue a certificate in conformity with the draft; and that this certificate, having been published in the gazettes, shall have the same force and operation and shall be as absolutely valid and conclusive as if the contents (taken in conjunction with this act) had been expressly enacted by parliament.² Where the promoters are not a company incorporated by special act or

by previous certificate under this act, and are seven or more in number, a company shall be incorporated by the certificate for the purposes thereof; or if the promoters are less than seven in number they may be incorporated if they so desire.³ Where the certificate incorporates a company, it shall contain provisions with apt terms for creating a body corporate, by an appropriate name, with perpetual succession and a common seal, and with power to take, hold and dispose of lands and other property, for the purposes and subject to the restrictions of the certificate, and may confer on the company the power to borrow on mortgage, and all other usual or proper powers.⁴ It is not obligatory upon the board of trade to grant the application of the promoters.⁵ It is provided that no railway constructed under the Railways Construction Facilities Act shall be exempt from the provision of any general act of parliament relating to railways passed before or after the issuing of the certificate; and the power is reserved to Parliament to revise and alter the maximum tolls and charges allowed to be taken under the certificate. The certificate may be corrected, amended or repealed by the board of trade, also, upon the application of the company or persons to whom it was granted.⁶

1 27 & 28 Vict. ch. 121.

2 27 & 28 Vict. ch. 121, §§ 1—19.

3 27 & 28 Vict. ch. 121, §§ 24, 25.

4 27 & 28 Vict. ch. 121, § 26.

5 27 & 28 Vict. ch. 121, § 52.

6 27 & 28 Vict. ch. 121, §§ 53, 53, 59.

**§ 40. Of amendment and repeal of charter—
The State's reserved power.—**When the charter

has been once given it cannot be amended nor repealed without the consent of the corporation, unless that power has been reserved to the State by the act of incorporation,¹ or by the constitution of the State,² or by general laws applicable to subsequently created corporations.³ It is a tacit condition, however, annexed to every charter of a private corporation, that the State may revoke the grant for misuser or non-user thereof.⁴ Where the State has reserved the absolute power to repeal, the action of the legislature cannot be reviewed by the judiciary.⁵ But if the power to repeal has been reserved only in case of abuse of the franchise by the corporation, whether there has been such an abuse may be inquired into by the courts.⁶ No intention of repealing a previous legislative provision subjecting all charters to alteration, suspension and repeal by the legislature, is indicated by a provision that a charter shall take effect only upon the filing of a written assent thereto within six months by the company.⁷

1 *Hamilton v. Keith*, 5 Bush, 453.

2 As in N. Y. (Const. 1843, art. 8, § 1), Tex., Pa., Wis., Md., Del., N. C., Ark., Or., Nev., Col., Ala. and Me. In Maine, however, only by general laws: *Stimson's Am. Stat. Law* (1886) § 442.

3 *In re Lee's Bank*, 21 N. Y. 9.

4 *State v. Minnesota Central R'y Co.* (1887) 36 Minn. 246; *Darnell v. State* (1887), 48 Ark. 321. See also *Louisville Turnpike Co. v. Ballard*, 2 Met. (Ky.) 165, where, although no right to do so was reserved, the State was held to have the power to amend the charter with respect to the sale of the property of the corporation for debt in certain cases, without the assent of the company.

5 *Greenwood v. Freight Co.* 105 U. S. 13; *Northern R. R. Co. v. Miller*, 10 Barb. 260.

6 *Erie & N. E. R. R. Co. v. Casey*, 26 Pa. St. 267; *Baltimore v. Pittsburg & O. R. R. Co.* 1 Abb. U. S. 9.

7 *Little v. Bowers*, 46 N. J. 300.

§ 41. **Constitutional provisions concerning amendment and repeal.**—Several of the united

American States which adopted new constitutions between the years 1870 and 1876, declared void all existing charters or grants of special or exclusive privileges under which a *bona-fide* organization had not taken place at the time of the adoption of the new constitutions.¹ It is provided by the constitutions of many of the States that all general laws for the creation of corporations may be altered or repealed.² The constitution of South Carolina, in providing for the creation of corporations under general laws, reserves to the State the power to amend these laws from time to time, by act of legislature;³ and this has been construed to confer upon the legislature the right to amend such general laws irrespective of any reservation in the laws themselves to that effect.⁴ In Missouri, Texas and Colorado, the constitutions provide that no general or special law shall be enacted for the benefit of railway corporations existing at the time of the adoption of the constitution, except upon condition that the companies shall thereafter hold their charters subject to the provisions of the constitution.⁵ In several other States the constitutions contain a like provision applicable to all corporations.⁶ But a State cannot by the adoption of a new constitution annulling monopoly rights of pre-existing corporations deprive them of exclusive privileges theretofore granted.⁷ The reservation in the constitution of a State of the right to amend or repeal corporate charters "unless a contrary intent be expressed" therein, is clearly waived by the declaration in a charter that it shall be altered or amended only upon the concurrence of the corporation.⁸

1 Stimson's Am. Stat. Law (1886), § 444, citing the constitutions of Pa., Ill., Neb., W. Va., Mo., Ark., Ala. and Colo.

2 Stimson's Am. Stat. Law, (1886) § 412, citing the constitutions of N. Y., N. J., Pa., Ohio, Mich., Wis., Iowa, Kan., Neb., Md., N. C., Tenn., Ark., Cal., Or., Nev., Colo., S. C., Ala. and Me. In the latter the provision is carefully guarded by requiring the repeal or alteration to be by general law.

3 S. C. Const. (1868), art. 12, § 5.

4 Charlotte, C. & A. R. R. Co. v. Gibbens (1888), 27 S. C. 385.

5 Mo. Const. (1875.) art 12, § 21; Tex. Const. (1870), art. 10, § 8; Colo. Const. (1876) art. 15, § 7.

6 Stimson's Am. Stat. Law (1886), § 444, citing the constitutions of Ga., La., Ark. and Fla.

7 St. Tammany Waterworks Co. v. New Orleans Waterworks Co. (1887) 120 U. S. 64.

8 Louisville Gas Co. v. Citizens' Gas Co. 115 U. S. 683.

§ 42. **Restrictions upon the power to repeal and amend — The general rule.**—The power of alteration and amendment is not without limit; the alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of incorporation. Sheer oppression and wrong is not to be inflicted under the guise of amendment,¹ impairing the object of the grant or vested rights under it.² It is provided in the New York general railroad act that the legislature may at any time annul or dissolve any incorporation formed thereunder, with the proviso, however, that the dissolution shall not take away or impair any remedy given against the corporation, its stockholders or officers, for any liability which shall have been previously incurred.³ In Georgia and Tennessee and in Oregon there are constitutional guaranties against the alteration or repeal of laws creating corporations in a manner to impair or destroy vested corporate rights.⁴ In Iowa such acts of repeal or amendment can be passed by the legislature only by a two-thirds vote of the mem-

bers present in each house;⁵ and in Michigan only by a two-thirds vote of the members *elected* to each house.⁶ The charter of a corporation cannot be repealed or amended by any act of legislature which does not directly refer to it.⁷ Where the State has reserved the power to repeal for specified causes, it cannot forfeit the charter upon other grounds than those enumerated, nor can it exercise this reserved power without an inquiry giving the corporation an opportunity to be heard.⁸

1 *Shields v. Ohio*, 95 U. S. 325; *Spring Valley Water Works v. Board of Supervisors*, 61 Cal. 3.

2 *Close v. Glenwood Cemetery*, 107 U. S. 466; *Miller v. State*, 15 Wall. 478; *Mayor v. Norwich & W. R. R. Co.* 109 Mass. 103.

3 N. Y. Laws of 1850, ch. 140, § 48.

4 Tenn. Const. (1870) art. 11, § 8; Or. Const. (1857), art. 11, § 2. Or the rights of corporators or corporation creditors: Ga. Const (1877), art. 12, §§ 1, 5.

5 Iowa Const. (1857) art. 8, § 12.

6 Mich. Const. (1850) art. 15, § 8.

7 *City of Grand Rapids v. Grand Rapids Hydraulic Co.* (Mich. 1887), 33 N. W. Rep. 749.

8 *Baltimore v. Pittsburgh R. R. Co.* 1 Abb. 9. N. corporation shall be dissolved or its rights impaired except by judicial proceedings: Ariz. Bill of Rights, 29.

§ 43. The power of amendment not to be exercised so as to affect the rights of shareholders *inter sese*.—Although it has been said that under such reserved power the legislature has the same rights to amend the charter that it would have had in case the Dartmouth College case had decided that charters were not contracts,¹ yet the State, notwithstanding the reservation of the power to amend, cannot change the whole character of the enterprise and compel the corporation to proceed under the amended charter.² For the reserved power to make a compulsory amendment is in the nature of

a police power designed for the protection of the public welfare.³ And it is not to be exercised with reference to any questions between the corporation and its shareholders, but solely with reference to matters between the corporation and the State.⁴ For even when the State has reserved the power to amend, any amendment affecting the rights of stockholders *inter sese*, or authorizing a fundamental change in the purposes and objects of the corporation, is to be regarded merely as an enabling act having no operation until accepted by all the shareholders of the company.⁵

1 Cook on Stock & Stockh. § 501, citing *County of San Mateo v. South'n Pacific R. R. Co.* 8 Sawyer, 238, 279; *Detroit v. Detroit and H. Plank Road Co.* 43 Mich. 140.

2 Cook on Stock & Stockh. § 501.

3 *Cross v. Peach Bottom R'y Co.* 90 Pa. St. 392. In several of the American States the constitutions declare that the exercise of the police power of the State shall never be so construed or abridged as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the State: Stimson's Am. Stat. Law (1886), § 441, citing the constitutions of Pa., Mo., Cal., Colo., Ga. and La.

4 *Knoxville v. Railroad Co.* 22 Fed. Rep. 758; *Kenosha, R. & R. I. R. Co. v. Marsh*, 17 Wis. 13; *Troy & R. R. Co. v. Kerr*, 17 Barb. 581; *Orr v. Bracken Co. etc.* 81 Ky. 593; *Cross v. Peach Bottom R'y Co.* 90 Pa. St. 32.

5 *Mills v. Central R. R. Co.* 41 N. J. Eq. 5.

§ 44. The same subject continued and illustrated.—Thus, although the power to amend had been reserved, it has been held that it could not be exercised to change the method of voting at corporate meetings, without the consent of the stockholders.¹ But under a reserved power to amend, it has been held that the State may authorize a consolidation;² and *per contra*, that it may not;³ that authority may be given to subscribe for stock in another railway;⁴ to borrow money and build branch roads;⁵ and to reduce the capital stock.⁶

- 1 *Orr v. Bracken Co. etc.* 81 Ky. 593.
- 2 *Bishop v. Brainerd*, 28 Conn. 289.
- 3 *Mowrey v. Indiana & C. R. R. Co.* 4 Biss. 78; *Kenosha, R. & R. I. R. R. Co. v. Marsh*, 17 Wis. 13.
- 4 *White v. Syracuse & U. R. R. Co.* 14 Barb. 559.
- 5 *Northern R. R. Co. v. Miller*, 10 Barb. 260.
- 6 *Joslyn v. Pacific Mail Steamship Co.* 12 Abb. Pr. N. S. 329; *White Hall & P. R. R. Co. v. Myers*, 16 Abb. Pr. N. S. 34; *Kenosha, R. & R. I. R. R. Co. v. Marsh*, 17 Wis. 13.

§ 45. When shareholder's consent to amendment is requisite.—When a compulsory amendment does not overstep the limits within which the State may lawfully exercise the reserved power to amend, it is not requisite to its legality that it be accepted by the stockholders.¹ But if it exceed those limits its validity will depend upon its unanimous acceptance.² An absolute or compulsory amendment to the charter of a corporation not conditioned upon its acceptance by the stockholders, as, for example, an act increasing the liability upon shares of stock, or imposing a tax upon stock which by the terms of the charter has been exempted from taxation, is absolutely void.³ And the acceptance of such an unconditional amendment imposing a greater liability upon stock may be restrained by any shareholder,⁴ unless the State has reserved the absolute power to amend.⁵ And although an act of amendment be conditioned upon its acceptance by a majority of the stockholders, it is not binding upon a dissenting minority.⁶ It has been held in Pennsylvania, however, that although the dissenting minority are not bound by the amendment, they cannot prevent the majority from accepting and exercising the enlarged powers.⁷

1 *Zabriskie v. Hackensack & N. Y. R. R. Co.* 18 N. J. Eq. 178; 90 Am. Dec. 617; *Bishop v. Brainerd*, 28 Conn. 289.

2 *Kenosha, R. & R. I. R. R. Co. v. Marsh*, 17 Wis. 13.

3 *Farrington v. Tennessee*, 95 U. S. 679; *Gordon v. Appeal Tax Court*, 3 How. 133; *Cook on Stock & Stockh.* § 497.

4 *Fry v. Lexington etc. F. R. R. Co.*, 2 Met. (Ky.) 314. *Cf. Mowrey v. Indianapolis etc. R. R. Co.*, 4 Blss. 78; 62 Am. Dec. 685; *Lauman v. Lebanon etc. R. R. Co.* 30 Pa. St. 42. 72 Am. Dec. 685.

5 *Cross v. Peach Bottom R'y Co.* 90 Pa. St. 392; *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547.

6 *New Orleans R. R. v. Harris*, 27 Miss. 517; *State v. Dawson*, 16 Ind. 40; *Hamilton Ins. Co. v. Hobart*, 2 Gray, 543; *Angell & Ames on Corporations*, § 81.

7 *Angell & Ames on Corporations*, § 81; *Curry v. Scott*, 54 Pa. St. 270.

§ 46. **The distinction between fundamental and incidental amendments.**—Each shareholder in an incorporated company has a right to insist on the prosecution of the particular objects of the charter. He cannot be deprived of his rights or privileges without his consent. Such alterations of the charter as are necessary to carry into effect its main design may be made without his consent. But an alteration which materially and fundamentally changes the responsibilities and duties of the company, or which superadds an entirely new enterprise to that which was originally contemplated, may be resisted by the stockholders, unless such alterations are provided for in the charter itself or in the general laws of the State in force at the time the act of incorporation was passed.¹ No provision to that effect in the amendment itself can authorize a majority of the stockholders to bind the minority.² An amendment, however, which is not a material or fundamental change of the original plan, and is consistent with carrying out the purposes for which the corporation was organized, merely granting new powers or authorizing new methods for effecting the original purposes, may be constitutional and valid, and upon being

izing certain changes of route,¹ and the building of branch roads,² have been held immaterial; so also an extension of the time for completing the construction of the road;³ and under certain circumstances authority to issue preferred stock;⁴ to increase the common stock;⁵ to increase the capital stock and extend the road;⁶ to reduce the capital stock and to shorten the road;⁷ to increase the number of directors;⁸ to change the corporate name;⁹ to change the terminus;¹⁰ to purchase another railway;¹¹ and to effect consolidations with roads taking the place of part of the line as laid out,¹² has been held not to be a fundamental alteration of the plan and purposes of the corporation.

1 Willson v. Willis V. R. R. Co. 33 Ga. 466; Johnson v. Pensacola & G. R. R. Co. 9 Fla. 239; Peoria & O. R. R. Co. v. Elting, 17 Ill. 429; Sanat v. Alton & S. R. R. Co. 13 Ill. 504.

2 Greenville & C. R. R. Co. v. Coleman, 5 Rich. L. 118; Peoria & R. I. R. R. Co. v. Preston, 35 Iowa, 115; Peoria & O. R. R. Co. v. Elting, 17 Ill. 429.

3 Bailey v. Hollister, 26 N. Y. 112; Poughkeepsie etc. Co. v. Griffin, 24 N. Y. 150; Agricultural B. R. R. Co. v. Winchester, 13 Allen, 29. See also Taggart v. Western R. R. Co. 24 Md. 553; 89 Am Dec. 760; and Danbury etc. R. R. Co. v. Wilson, 22 Conn. 435, in which cases, however, the power to amend had been reserved.

4 Rutland & B. R. R. Co. v. Thrall, 35 Vt. 536; Everhart v. West Chester & P. R. R. Co. 28 Pa. St. 339.

5 Covington v. Covington & C Bridge Co. 10 Bush, 69.

6 Rice v. Rock Island R. R. Co. 21 Ill. 93; Peoria & O. R. R. Co. v. Elting, 17 Ill. 429. Cf. Cross v. Peach Bottom R'y Co. 90 Pa. St. 392; Illinois River R. R. Co. v. Zimmer, 20 Ill. 654.

7 Troy & R. R. R. Co. v. Kerr, 17 Barb. 581.

8 Mower v. Staples, 32 Minn. 284; Pacific R. R. Co. v. Hughes, 22 Mo. 297; 64 Am. Dec. 265; Greenville etc. R. R. Co. v. Johnson, 8 Baxt. 332; Fry v. Lexington & F. R. R. Co. 2 Met. (Ky.) 322; Fall River Iron Works v. Old Colony R. R. Co. 5 Allen, 221.

9 Clark v. Monongahela Navigation Co. 10 Watts, 364; Bucksport & B. R. R. Co. v. Buck, 68 Me. 81.

10 Ross v. Chicago etc. R. R. Co. 77 Ill. 134; Pacific R. R. Co. v. Renshaw, 18 Mo. 210.

11 Venner v. Atchison etc. R. R. Co. 28 Fed. Rep. 581.

12 Sprague v. Illinois River R. R. Co. 19 Ill. 174; Hanna v. Cincinnati & Ft. W. R. R. Co. 20 Ind. 30.

§ 48. Examples of fundamental amendments. Under other circumstances an amendment authorizing a change or shortening of the route has been held to be material and not valid without the unanimous consent of the shareholders.¹ And many amendments similar or identical with those enumerated above as immaterial, have under a different state of facts been held material, as amendments granting authority to change a terminus;² to shorten the line;³ to extend the line;⁴ to consolidate with another corporation;⁵ to increase the par value of the stock;⁶ to go into water transportation;⁷ to commence business operations before the full capital stock has been subscribed;⁸ to divide the line and to form two or more corporations;⁹ and to extend the charter, making it perpetual, and to increase the power of holding property.¹⁰

1 *Hester v. Memphis & C. R. R. Co.* 32 Miss. 378; *Winter v. Muscogee R. R. Co.* 11 Ga. 438; *Witter v. Mississippi, O. etc. R. R. Co.* 20 Ark. 463; *Champion v. Memphis etc. R. R. Co.* 35 Miss. 692.

2 *Marietta & C. R. R. Co. v. Elliott*, 10 Ohio St. 67; *Manheim etc. Co. v. Arndt*, 31 Pa. St. 317; *Middlesex etc. Co. v. Locke*, 8 Mass. 267; *Middlesex etc. Co. v. Swan*, 8 Mass. 385.

3 *Bank v. City of Charlotte*, 85 N. C. 433.

4 *Stevens v. Rutland & B. R. R. Co.* 20 Vt. 545.

5 *Illinois G. T. R. R. Co. v. Cook*, 29 Ill. 237; *New Orleans, J. & G. N. R. R. Co. v. Harris*, 27 Miss. 517; *Booe v. Junction R. R. Co.* 10 Ind. 93; *McCray v. Junction R. R. Co.* 9 Ind. 358.

6 *Mahon v. Wood*, 44 Cal. 462.

7 *Hartford & N. H. R. R. Co. v. Croswell*, 5 Hill, 383; 40 Am. Dec. 354; *Marietta & C. R. R. Co. v. Elliott*, 10 Ohio St. 57.

8 *Memphis Branch R. R. Co. v. Sullivan*, 57 Ga. 240.

9 *Supervisors v. Mississippi & W. R. R. Co.* 21 Ill. 338; *Carlisle v. Terre Haute etc. R. R. Co.* 6 Ind. 316.

10 *Property of the Union Lock and Canals v. Towne*, 1 N. H. 44.

§ 49. Of the shareholder's remedy against illegal amendments.—An illegal amendment releases stockholders who have not paid their subscriptions

from liability thereon.¹ The only remedy of a stockholder who has paid his subscription, against an illegal amendment, is by injunction.² But assent or acquiescence, silence under circumstances that called upon him to dissent, if he so intended, may bar a stockholder's remedy against an illegal amendment.³ Assent, however, is not to be presumed, but must be proven.⁴

1 *Clearwater v. Merrill*, 1 Wall, 25; *Nugent v. Supervisors*, 19 Wall. 241; *Champion v. Memphis etc. R. R. Co.* 35 Miss. 692.

2 *Mowry v. Indiana & C. R. R. Co.* 4 Biss. 78; *Stevens v. Rutland & B. R. R. Co.* 20 Vt. 245; *Cook on Stock & Stockh.* § 5.2.

3 *Cook on Stock & Stockh.* § 50; *Bedford R. R. Co. v. Bowser*, 48 Pa. St. 29; *Martin v. Pensacola & C. R. R. Co.* 8 Fla. 370; 73 Am. Dec. 713. So also *laches*: *Gifford v. New Jersey R. R. Co.* 10 N. J. Lq. 141.

4 *Cook on Stock & Stockh.* § 5.3; *March v. Eastern R. R. Co.* 43 Ill. 515; 75 Am. Dec. 732. For a very full and learned discussion of the whole question of amendments and repeals of charters, see *Cook on Stock & Stockh.* § 492-503.

§ 50. How far a corporation may exist and transact business in a foreign State.—Since the decision of the Supreme Court in the case of the *Bank of Augusta v. Earle*,¹ it has been the recognized rule of American law that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. Existing by force of law only, where that law ceases to operate the corporation can have no legal existence. It must dwell in the place of its creation, and "it cannot hold meetings, pass votes, or do any corporate acts, strictly so-called, outside of that sovereignty."² It is a well-settled principle, however, that a corporation, in the absence of express restrictions or prohibitions, may, through its *agents*, lawfully exercise its corporate functions outside of the State or country creating it; as, for example, that it may make any lawful contract, carry on its

business, sue or be sued, and acquire, hold and convey property.³ But it is only through the comity of nations that a foreign corporation can do business in a State in which it is not incorporated. It does not come within that provision of the federal constitution extending to the citizens of each State all the privileges and immunities of citizens in the several States.⁴ A corporation, however, being a "person," is subject to the liabilities and entitled to the privileges of natural persons, except in cases in which the law is clearly inapplicable to artificial persons.⁵ Accordingly a railway, like a private person, may have a legal residence in one State, where it may sue and be sued, and its legal domicile in another from which it derives its charter.⁶ It is to be regarded as a resident of each State or county through which its road may pass, or in which it has established an office for the transaction of business, being subject to and entitled to the protection of the laws thereof.⁷ And where it has acquired such a legal residence, it is not to be served by constructive summons as a non-resident;⁸ nor is it to be taxed as a non-resident.⁹ In California and Arkansas the State constitutions forbid the enactment of laws permitting corporations organized out of the State to transact business on more favorable terms than are prescribed for similar corporations organized within the State.¹⁰ But the constitution of Louisiana permits the granting of licenses to foreign corporations on a principle different from corporations holding their charters from that State.¹¹

1 13 Pet. 519.

2 *Smith v. Silver Mining Co.* 64 Md. 85; 54 Am. Rep. 760; *Bank of Augusta v. Earle*, 12 Pet. 519, 583; *Paul v. Virginia*, 8 Wall. 161; *Ryan*

v. Coster, 14 Pet. 122, 131; *Day v. Newark India Rubber Co.* 1 Blatch. C. O. 628; *Miller v. Ewer*, 27 Me. 509; 64 Am. Dec. 619; *Farnum v. Blackstone Canal Co.* 1 Sumn. 46. See also Cook on Stock and Stockh. § 591; Taylor on Corporations, § 382; Wood on Railways, § 139.

3 *Wells v. Northern Pacific R'y Co.* 23 Fed. Rep. 469; *Runyan v. Coster*, 14 Pet. 122, 129; *Bank of Augusta v. Earle*, 13 Pet. 519, 538; *Harlow Road Co. v. Harris*, 12 Wall. 82; *Ex parte Schollenberger*, 95 U. S. 369; *Merrick v. Van Santvoord*, 34 N. Y. 208; *Kerchner v. Gettys*, 19 N. C. 521; *Baldwin v. Mississippi R. R. Co.* 5 Iowa, 518; *Bard v. Pool*, 12 N. Y. 495; *Christian Union v. Yount*, 101 U. S. 356; *United States v. Insurance Co.* 22 Wall. 99; *Newby v. Colt's Patent Fire-arms Co.* Law R. 7 Q. B. 293; *Leazure v. Union Mutual Life Ins. Co.* 91 Pa. St. 491.

4 *Paul v. Virginia*, 8 Wall. 168.

5 *Wright v. New York Central R. R. Co.* 28 Barb. 80; *Field v. New York Central R. R. Co.* 29 Barb. 176; *Olcott v. Tioga R. R. Co.* 20 N. Y. 210; 75 Am. Dec. 393; *Boyd v. Craydon R'y Co.* 4 Bing. N. C. 669; *Mineral Point R. R. Co. v. Keep*, 22 Ill. 9; 74 Am. Dec. 124; *United States v. Smedley*, 11 Wheat. 332.

6 *Louisville etc. R. R. Co. v. Lettsen*, 2 How. Pr. 497; *New York & E. R. R. v. Shepard*, 5 McLean, 455; *Androscoggin etc. R. R. Co. v. Stevens*, 17 Me. 434; *Thorne v. N. Y. Central R. R. Co.* 36 N. J. 121.

7 *Glaize v. South Carolina R. R. Co.* 1 Strob. 70; *Pond v. Hudson River R. R. Co.* 17 How. Pr. 511; *Richardson v. Burlington etc. R. R. Co.* 8 Iowa, 260; *Baldwin v. Mississippi etc. R. R. Co.* 5 Iowa, 518. But see *Hubbard v. National Protection Co.* 11 How. Pr. 149.

8 *Belden v. New York & H. R. R. Co.* 15 How. Pr. 17.

9 *People v. Fredericks*, 48 Barb. 173.

10 Cal. Const. (1873), art. 12, § 15; Ark. Const. (1874), art. 12, § 11.

11 But the system must be uniform: La. Const. (1879), § 217; see also Ark. Const. (1874), art. 12, § 11.

§ 51. Of directors' meetings in a foreign State.

Although as a general rule a corporation cannot hold meetings, and transact its internal corporate business in a State foreign to the one from which it derives its charter,¹ yet it seems clear that a board of directors of a corporation may in a proper case lawfully meet and transact business outside of the State creating it, and that their proceedings will be binding upon the corporation.² The legislature may validate the acts of a meeting of shareholders held beyond the borders of the State, in case it could have authorized the meeting so to be held in the first place.³

¹ *Hilles v. Parrish*, 1 McCart. (N. J.) 330, where it was held that a resolution of directors at a meeting held in a foreign State, transferring

stock to certain of their own number, was inoperative. *Cf.* *People v. Geneva College*, 5 Wend. 211. But see *McCall v. Byram Mfg. Co.* 6 Conn. 428, where the appointment of a secretary of the corporation by the directors at a meeting held without the State was declared valid, although the person so appointed reside permanently in the foreign State.

2 *Wood Hydraulic Mining Co. v. King*, 45 Ga. 40. *Acc.* *McCall v. Byram Mfg. Co.* 6 Conn. 428; *Smith v. Alvord*, 63 Barb. 415; *Wright v. Bunby*, 11 Ind. 398, 494; *Bellows v. Todd*, 39 Iowa, 200, 217; *Ohio etc. R. R. Co. v. McPherson*, 35 Mo. 13; 86 Am. Dec. 128; *Galveston R. R. Co. v. Cowdery*, 11 Wall. 451, 475; *Armes v. Couant*, 31 Vt. 744; *Bassett v. Monte Cristo Mining Co.* 15 Nev. 293. *Contra*, *Hiller v. Parish*, 14 N. J. Eq. 350, an unconsidered *dictum*; *Ormsby v. Copper Mining Co.* 56 N. Y. 623, among memoranda of cases not reported in full.

3 *Graham v. Boston etc. R. R. Co.* 118 U. S. 161, 178. *Cf.* *Shaw v. Norfolk R. R. Co.* 5 Gray, 162.

§ 52. Of stockholders' meetings in a foreign State.—But with respect to stockholders' meetings the rule is different. While the directors are merely the agents of the body corporate, the stockholders, meeting and acting as such, are the corporation itself, which is incapable of existence without the territorial bounds of the State creating it; accordingly it would seem to be an indisputable proposition that shareholders' meetings can be lawfully held only within the incorporating State.¹ It has been said, however, that the proceedings of such a meeting are not absolutely void, but avoidable only;² and that the corporation itself,³ and participating shareholders,⁴ are estopped to deny the legality of the meeting. The shareholders of a corporation duly incorporated in more than one State may hold meetings in any of the States from which they derive their charter;⁵ and the proceedings of a meeting in one of the States are valid with respect to the property of the corporation in all of them, without the necessity of the repetition of the meeting in the other States.⁶

1 *Miller v. Fwer*, 27 Me. 509; 65 Am. Dec. 619; *Taylor on Corporations*, §§ 42, 51. See the author's note to *Graham v. Boston H. & E. R. Co.* (118 U. S. 161), 35 Am. & Eng. R'y Cas. 52, 61, 70; *Astinwall v. Ohio etc. R. R.*

Co. 20 Ind. 492, 497; 83 Am. Dec. 329; *Ormsby v. Vermont Cooper Mining Co.* 56 N. Y. 623; *Hilles v. Parish*, 14 N. J. 330. *Vide infra*, §§ 435, 436.

2 *Ohio etc. R. R. Co. v. McPherson*, 35 Mo. 13; 83 Am. Dec. 123.

3 *Heath v. Silverthorn Lead Mining Co.* 20 Wis. 146.

4 *Ohio etc. R. R. Co. v. McPherson*, 35 Mo. 13; 83 Am. Dec. 123.

5 *Graham v. Boston, H. & E. R. R. Co.* 118 U. S. 161. *Cf. Richardson v. Vermont R. R. Co.* 41 Vt. 613. *Contra, Aspinwall v. Ohio R. R. Co.* 20 Ind. 42; 83 Am. Dec. 329.

6 *Graham v. Boston, H. & E. R. R. Co.* 118 U. S. 161; *Cook on Stock & Stockh.* § 592.

§ 53. **Of companies incorporated in more than one State.**—A railway company holding charters from two or more States is a distinct corporation in each.¹ Although the capital stock of a railway chartered in several States be a unit held by one set of shareholders, and the management of the road be in the hands of one set of directors, yet the corporation is to be regarded as having a domicile² in each State, and as to its property in each State it is a distinct corporation subject to the laws thereof.² And unlike a private person, it may in this way have at the same time more than one legal domicile.³ Ordinarily, however, a corporation is deemed to have its residence or “home” only in the place where its principal office is situated, where its profits come home to it, whence orders emanate, and where the chief officers of the company are to be found.⁴ And perhaps the sounder view is that this question is one rather of legislative intent than of legislative power or legal possibility. In general it seems to be held that there exists in these cases one corporation, and that its existence is in several States, rather than that there is a several existence in each State.⁵ In suits by or against a citizen of one State from which it derives a charter, a railway cannot claim to be a citizen of another State

from which it likewise holds a charter, for the purpose of removing causes to or instituting action in the federal courts.⁶ In a recent case, however, it has been held that a corporation chartered in two States may be sued by a citizen of one of them in the federal court, and that for the purpose of the suit the corporation is to be deemed a citizen of the other State.⁷

1 *Graham v. Boston H. & E. R. R. Co.* 118 U. S. 161; *Stone v. Farmers Loan & Trust Co.* 116 U. S. 307; *Muller v. Dowes*, 94 U. S. 444; *Ohio & M. R. R. Co. v. Wheeler*, 1 Black, 286; *Alleghany Co. v. Cleveland etc. R. R. Co.* 52 Pa. St. 248; *Asp nwall v. Ohio etc. R. R. Co.* 20 Ind. 492; 83 Am. Dec. 329; *Sprague v. Hartford etc. R. R. Co.* 5 R. I. 233; *State v. Northern Central R'y Co.* 18 Md. 193; *County of Alleghany v. Cleveland etc. R. R. Co.* 51 Pa. St. 228; 88 Am. Dec. 579.

2 *Graham v. Boston, H. & E. R. R. Co.* 118 U. S. 161; *Clark v. Barnard*, 108 U. S. 436; *Baltimore & O. R. R. Co. v. Harris*, 12 Wall. 65.

3 *Covington etc. Bridge Co. v. Mayer*, 31 Ohio St. 817.

4 *Adams v. Great Western R'y Co.* 6 Hurl. & N. 404; *Thorn v. Central R. R. Co.* 26 N. J. 121; *Hubbard v. National Protection Ins. Co.* 11 How. Fr. 149; *Androscoggin etc. R. R. Co. v. Stevens*, 17 Me. 434. *Vide infra*, §§ 435, 436.

5 *Indianapolis etc. R. Co. v. Vance*, 96 U. S. 450; *Baltimore & O. R. Co. v. Gallahue*, 12 Gratt. 655; 65 Am. Dec. 254; *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. 431; 26 Am. Rep. 384; *Baltimore & O. R. Co. v. Noell*, 32 Gratt. 394; *Goshorn v. Ohio County*, 1 W. Va. 308.

6 *Callahan v. Louisville etc. R. Co.* 11 Fed. Rep. 536; *Ohio & M. R. R. Co. v. Wheeler*, 1 Black. 286; *Missouri etc. R. Co. v. Texas etc. R. Co.* 10 Fed. Rep. 497; *County of Allegheny v. Cleveland etc. R. R. Co.* 51 Pa. St. 228; 88 Am. Dec. 539.

7 *Page v. Fall River, W. & P. R. Co.* 31 Fed. Rep. 257.

§ 54. Of the distinction between a license and an act of incorporation.—When a railway is incorporated in one State, and seeks to exercise its franchises in another, its right so to act may be conferred upon it either by way of license or by way of incorporation. If it be merely licensed to operate a railway in a State other than that from which it derives its charter, it does not by force of such license become a corporation of the State granting this privilege, but remains as it was be-

fore—a domestic corporation in the State which created it, and a foreign corporation in the State which has licensed it to exercise its franchises within its borders.¹ The distinction between a license and an act of incorporation is a most material one, and is frequently insisted upon.² For the essential properties of corporate *existence* are quite distinct from the franchises or privileges granted to a corporation. The franchise of being a corporation belongs to the incorporators, while the powers and privileges vested in and to be exercised by the corporate body, as such, are the franchises of the corporation.³ A mere recognition of a corporation of another State by the legislature is not sufficient to create it a corporation in the State so recognizing it. Accordingly, acts of the legislature in this respect are to be strictly construed. For corporations are created not by implication nor by recognition, but by plain words of incorporation manifesting positive intent to create.⁴ Thus where it was clear from the body of an act conferring upon a foreign corporation the right to take land and operate a railway within the State, that the intention of the legislature was not to create a new corporation, it does not constitute the company a domestic corporation, although it may be entitled, “An act to incorporate,” etc.⁵ And if a State confer upon a foreign corporation a license to condemn land and to build and operate a railway within its borders, it does not by this act necessarily become a domestic corporation in the State granting the privileges;⁶ and the license so granted may be revoked at any time.⁷ Neither does a statute authorizing a foreign corporation to build and operate a

railway within the State, with a proviso that it shall be deemed a domestic corporation with respect to all causes of action arising within the State,⁸ constitute it a domestic corporation.⁹ So, also, where a corporation has leased a road in a State in which it has not been incorporated, it does not thereby cease to be a foreign corporation; and it is entitled to have actions against it brought by citizens of that State, removed to the federal courts.¹⁰ But where a foreign railway company is authorized by a statute of a State from which it holds no charter to purchase a railway therein, and by the provisions of the statute all the rights, privileges, powers, duties and liabilities of the purchased road are conferred and imposed upon the former, it amounts to an act of incorporation, and the purchasing company becomes with respect to its property in that State a domestic corporation.¹¹ A railway corporation is not estopped to deny its existence in any State merely by recitals in instruments which have been put out in its name,¹² a recital of citizenship concerning a corporation being a recital of a matter of law.¹³ A State cannot, in granting a license to a foreign corporation to do business within its borders, impose a condition contrary to the constitution of the United States, as for example, that it surrender the right to remove causes to the federal courts.¹⁴ A provision in a State constitution prohibiting foreign corporations to do business within the State, without having one or more known places of business, and an authorized agent therein, upon whom process may be served, has been declared void, as

an attempt on the part of the State to impose a restriction upon navigation.¹⁵

1 Railroad Co. v. Harris, 12 Wall. 65.

2 Railway Co. v. Whitton, 13 Wall. 270, 284; Pomeroy v. New York etc. R. R. Co. 4 Blatchf. 120; Wheeling v. Baltimore, 1 Hughes, 90; State v. Railway Companies, 30 N. J. 473; City of Covington v. The Bridge Co. 10 Bush, 69; Dunnistoun v. New York etc. R. R. Co. 1 Hill. 62; Hart v. Boston H. & E. R. R. Co. 40 Conn. 524; Baltimore & O. R. R. Co. v. Cary, 23 Ohio St. 208; Erie R. R. etc. Co. v. Stringer, 32 Ohio, 468. *Acc.* Phillipsburgh Bank v. Lackawanna R. R. Co. 27 N. J. 206; Sprague v. Hartford etc. R. R. Co. 5 R. I. 233; Attorney-General v. Boston etc. R. R. Co. 109 Mass. 99; Attorney General v. Petersburg etc. R. R. Co. 6 Ired. 472.

3 Memphis etc. R. R. Co. v. Commissioners, 112 U. S. 619. *Cf.* Clark v. Barnard, 108 U. S. 435; Hall v. Sullivan etc. R. R. Co. 21 Law Rep. 138; New Orleans etc. R. R. Co. v. Delaware, 114 U. S. 508.

4 Memphis etc. R. R. Co. v. Commissioners, 112 U. S. 618; Wallace v. Loomis, 97 U. S. 146, 154; Central etc. R. R. Co. v. Georgia, 92 U. S. 665; Shelton v. Banks, 10 Gray, 401; Attorney-General v. Insurance Co. 82 N. Y. 172, 182; Attorney-General v. Railroad Co. 35 Wis. 425, 602. *Cf.* Indianapolis & St. L. R. R. Co. v. Vance, 93 U. S. 433.

5 Goodlett v. Louisville & N. R. R. Co. 122 U. S. 391.

6 Hand v. Savannah etc. R. R. Co. 12 S. C. 314; Eaton & H. R. R. Co. v. Hunt, 20 Ind. 457; Mead v. Housatonic R. R. Co. 43 Conn. 199; McElrath v. Pittsburgh etc. R. R. Co. 53 Pa. St. 189; Pennsylvania R. R. Co. v. St. Louis, A. & T. H. R. R. Co. 118 U. S. 290.

7 Wood's Railway Law, § 14, and cases cited *supra*.

8 Minn. Laws of 1381, ch. 221.

9 Chicago, M. & St. P. R'y Co. v. Becker, 32 Fed. Rep. 849; Mahoney v. Railway Co. 21 Fed. Rep. 817.

10 Baltimore & O. R. R. Co. v. Cary, 28 Ohio St. 208; Baltimore & O. R. R. Co. v. Koontz, 104 U. S. 5.

11 Graham v. Boston, H. & E. R. R. Co. 118 U. S. 161; Clark v. Barnard, 108 U. S. 436.

12 Dixon County v. Field, 111 U. S. 83; Carroll County v. Smith, 111 U. S. 536; Northern Bank v. Porter, 110 U. S. 608; School District v. Stone, 106 U. S. 183; Town of Coloma v. Eaves, 92 U. S. 481.

13 *Cf.* Conant v. Newton, 123 Mass. 103; Singer Manufacturing Co. v. Elizabeth, 42 N. J. 249; Hudson v. Winslow, 35 N. J. 437.

14 Barron v. Burnside, 121 U. S. 136.

15 New Orleans & M. P. Co. v. James, 32 Fed. Rep. 21.

§ 55. Of the consolidation of companies chartered in different States.—If a railway corporation be formed by the consolidation of two or more companies chartered by different States, there is a new corporation, and it is held to be possessed in full of the franchises, powers and property of the

corporations out of which it was formed. When the consolidation, as is usual, is effected by the concurrent action of the States in which the corporations to be consolidated exist, the new company is a corporation in each of those States, but deriving its franchises in each State from the legislation of that state alone.¹ Such a consolidated corporation is a citizen of each of the States within the purview of the legislative enactments of that State;² and for the purpose of determining the jurisdiction of the federal courts.³

1 *Philadelphia etc. R. R. Co. v. Maryland*, 10 How. 376; *Maryland v. Northern etc. R. R. Co.* 18 Md. 193; *Quincy Bridge Co. v. Adams Co.* 28 Ill. 619; *Racine v. Farmers' Loan & Trust Co.* 49 Ill. 349; *Eaton etc. R. R. Co. v. Hunt*, 20 Ind. 459; *Mead v. N. Y. etc. R. R. Co.* 45 Conn. 199; *Gardner v. James*, 5 R. I. 235.

2 *Gage v. Lake Shore etc. R. R. Co.* 70 N. Y. 220; *Chicago etc. R. R. Co. v. Auditor-General*, 53 Mich. 79; *Ohio etc. R. R. Co. v. Weber*, 96 Ill. 443; 8 C. 5 Am. & Eng. R'y Cas. 101; *Quincy Bridge Co. v. Adams Co.* 83 Ill. 619.

3 *Muller v. Dowes*, 94 U. S. 447; *Blackburn v. Selma etc. R. R. Co.* 2 Flippin, 525.

§ 56. The corporate name.—A corporation must have a corporate name, and by such name only can it act.¹ In contracts to which a corporation is a party it is not essential that the precise words of the name be employed. It is sufficient if the words identify the corporation intended.² A person after having entered into a written contract with a corporation which designates it by name, is thereafter estopped from denying its corporate existence and name.³

1 *Physicians' College v. Salmon*, 3 Salk. 102.

2 *Newport Mechanics' Co. v. Starbird*, 10 N. H. 123; 34 Am. Dec. 145; *Case of Linne-Regis*, 10 Co. Rep. 122.

3 *Hubbard v. Chappel*, 14 Ind. 601.

§ 57. Of the property of the corporation in its name.—A corporation may be restrained by

injunction from making use of a name similar to the name of another, whereby the public is deceived and led to suppose that the two corporations are identical.¹ A corporation cannot, however, acquire an exclusive title to a name descriptive merely of locality.²

1 *London Insurance v. London & Westminster Insurance Co.* 9 Jur. N. S. 843; *State v. McGrath* (1887), 92 Mo. 325; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 32 Fed. Rep. 94; 2 Story Eq. § 951 *et seq.*

2 *Colonial Life Assur. Co. v. Home & Colonial Life Assur. Co.* 33 Beav. 548.

§ 58. Of the duration of the corporation.—As a general rule when no time for the termination of the corporation is specified in the charter or by the general law under which it is created, the franchise is deemed a perpetual grant. But in Texas, when no time is named in the charter, the duration of a corporation is limited by statute to twenty years.¹ The charter of a railway company is not to be renewed or extended by implication, nor is it made a new corporation, by an act authorizing it to assume a new name and to extend its line.²

1 *Steadman v. Merchants' & Planters' Bank*, 69 Tex. 50; Tex. Act of 1874.

2 *Attorney-General v. Joy*, 55 Mich. 94.

CHAPTER III.

THE CAPITAL STOCK.

AND HEREIN OF SHARES OF STOCK, THEIR NATURE AS PERSONAL PROPERTY, AND THE SEVERAL KINDS THEREOF.

- § 59. Capital stock defined.
- § 60. Shares of stock defined.
- § 61. The distinction between shares and certificates of stock.
- § 62. Shares of stock are personal property.
- § 63. The several kinds of stock defined.
- § 64. Of preferred or guaranteed stock.
- § 65. Of the power to issue preferred or guaranteed stock.
- § 66. Of dividends upon preferred stock.
- § 67. Preferred shareholders not creditors.
- § 68. Of special stock.
- § 69. Of interest-bearing stock.
- § 70. Of watered or fictitious stock.
- § 71. Constitutional and statutory prohibitions of fictitious stock.
- § 72. Watered stock not void, but voidable only.

§ 59. **Capital stock defined.**—Capital stock, as defined by a learned author,¹ is the sum fixed by the corporate charter as the amount paid in, or to be paid in, by the stockholders, for the prosecution of the business of the corporation, and for the benefit of corporate creditors in case the corporation becomes insolvent. Capital stock has been variously defined by the courts as “that money or property which is put in a single corporate fund by those who by subscription therefor become members of a corporate body;”² or as “property or means contributed by the stockholders as the

fund or basis for the business or enterprise for which the corporation or association was formed,"¹ or as "the property of the corporation contributed by its stockholders, or otherwise obtained by it, to the extent required by its charter."² The capital stock is to be clearly distinguished from the property possessed by the corporation.³ For the capital stock remains fixed, although the actual property of the corporation may vary in value and be increased or diminished in amount.⁴ Accordingly a limit imposed upon the capital stock of a corporation does not restrict the amount of property which it may own.⁵ In the assessment of taxes and for many other purposes, the capital of a railway is the sum subscribed, or to be subscribed, by its share-owners, and does not include land-grants from the State or federal government.⁶ The amount of the shares subscribed and not the sum actually paid in, constitutes the capital of a corporation.⁷

1 Cook on Stock & Stockh. § 3.

2 Burrell v. Bushwick R. R. Co. 75 N. Y. 211.

3 Bailey v. Clark, 21 Wall. 284.

4 Williams v. Western Union Tel. Co. 93 N. Y. 182, 188. See further for definitions of capital stock, Hannibal & St. J. R. R. Co. v. Saack et al., 30 Mo. 651, 553; St. Louis I. Mt. etc. R. R. Co. v. Loftin, 30 Ark. 693, 703; State v. Cheraw & C. R. R. Co. 16 S. C. 524.

5 Cook on Stock & Stockh. § 3.

6 Cook on Stock & Stockh. § 3.

7 Barry v. Merchants' Exchange Co. 1 Sand. (N. Y.) 290.

8 Hightower v. Thornton, 8 Ga. 436, 52 Am. Dec. 412; St. Louis etc. R. R. Co. v. Loftin, 30 Ark. 693.

9 Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412; State Bank v. Milwaukee, 18 Wis. 281.

§ 60. Shares of stock defined.—A share of stock may be defined to be a right which a shareholder in a corporation has by reason of his ownership thereof to participate in a certain proportion

in the immunities and benefits of the corporation, to vote in the choice of its officers and the management of its concerns, to share in the dividends or profits, and to receive an aliquot part of the proceeds of the capital after the payment of the debts of the corporation and the winding-up of its affairs.¹ In Pennsylvania it has been said that "a share of stock is an incorporeal intangible thing. It is a right to a certain proportion of the capital stock of a corporation never realized except upon the dissolution and winding-up of the corporation, with the right to receive in the meantime such profits as may be made and declared in the shape of dividends."² In England shares of stock are regarded as annuities,³ or as it has been expressed by Grant, M. R., "the interest in stock is properly nothing but a right to receive a perpetual annuity, subject to redemption."⁴ In the standard treatise upon this subject, a share of stock is defined as the "right which its owner has in the management, profits and ultimate assets of the corporation."⁵

1 *Plimpton v. Bigelow*, 93 N. Y. 532, 533; *Fisher v. The Essex Bank*, 5 Gray, 373, 375; *Forbes v. Memphis etc. R. R. Co.* 2 Woods, 323, 331. See also for definitions of shares of stock: *Burrall v. Bushwick R. R. Co.* 75 N. Y. 211, 216; *Jermain v. Lake Shore etc. R. R. Co.* 91 N. Y. 483, 492.

2 *Neiler v. Kelley*, 63 Pa. St. 403, 407.

3 *The King v. Capper*, 5 Price, 217, 262.

4 *Wildman v. Wildman*, 9 Ves. 174, 177.

5 *Cook on Stock & Stockh.* § 5; *Plimpton v. Bigelow*, 93 N. Y. 532; *Jermain v. Lake Shore etc. R. R. Co.* 91 N. Y. 483, 492; *Burrall v. Bushwick R. R. Co.* 75 N. Y. 211, 216.

§ 61. **The distinction between shares and certificates of stock.**—As evidence of the ownership of shares of the stock of corporations, it is customary to issue certificates, which are written acknowledgments by the corporation of the interest of the

share-owner in the corporate property and franchises. These certificates are often loosely spoken of as being the stock itself. It should be remembered, however, that the certificate does not constitute the title to the stock. The registry of the stockholder's name upon the stock-books of the corporation, opposite the number of his shares, gives him his title. In legal contemplation the certificate is merely an additional and convenient evidence of the ownership of the stock.¹ Although the certificate is convenient as *prima facie* evidence of ownership,² which must be issued to every share-owner who demands it,³ yet without it the share-owner may vote,⁴ incur all the liabilities of a stockholder,⁵ receive his portion of dividends,⁶ and even transfer his stock.⁷

1 *Cincinnati etc. R. R. Co. v. Pearce*, 29 Ind. 502; *Hawley v. Brumagin*, 33 Cal. 394, where it was said "Stock is one thing, and certificates another. The former is the substance, and the latter is the evidence of it." *Johnson v. Albany etc. R. R. Co.* 40 How. Pr. 193.

2 *Walker v. Detroit Transit etc. Co.* 47 Mich. 338.

3 *Buffalo etc. R. R. Co. v. Dudley* 14 N. Y. 336, 347.

4 *Beckett v. Houston*, 32 Ind. 393.

5 *Mitchell v. Beckman*, 64 Cal. 117; *Agricultural Bank v. Wilson*, 24 Me. 273.

6 *Ellis v. Proprietors of Essex M. Bridge*, 2 Pick. 243.

7 *National Bank v. Watertown*, 105 U. S. 217; *First Nat. Bank v. Gifford*, 47 Iowa, 575. See Cook on Stock & Stockh. § 10, where this subject is treated at length.

§ 62 Shares of stock are personal property.—

Some of the earlier cases manifest a tendency to regard shares of stock in corporations whose property consisted of real estate, as being in the nature of a right or interest in lands, and therefore themselves real property.¹ But it is now well settled that shares are "incorporeal personal property."² The stock of every company formed under the New

York General Railroad Act of 1850 is declared to be personal estate and transferable in the manner prescribed by the by-laws of the company.¹ In England the Companies' Clauses Act of 1845 enacts that "all shares in the undertaking shall be personal estate and transmissible as such, and shall not be of the nature of real estate,"² and shares in an incorporated company, whether declared to be personal estate or not, are not within the statutes of mortmain.³ Shares of stock, although personal property, are not chattels,⁴ nor money,⁵ nor securities for money,⁶ nor credits,⁷ nor goods within the meaning of the English Factors' Acts, 1823 to 1877,⁸ nor goods and chattels within the meaning of 13 Elizabeth, ch. 5, relating to conveyances to hinder and defraud creditors.⁹ But shares are held in America to be goods, wares and merchandise within the meaning of the statute of frauds,¹⁰ although the contrary is the rule in England.¹¹ As personal property, shares of stock are in the nature of *choses in action*,¹² although not ordinarily reducible to possession.¹³ As *choses in action*, shares are not subject to levy and execution at common law in the absence of any statute rendering them expressly liable.¹⁴ Within the meaning of the English bankruptcy act of 1883,¹⁵ shares of stock are "things in action," and therefore not within the order and disposition clause.¹⁶

1 Copeland v. Copeland, 7 Bush. 349; Price v. Price, 6 Dana, 107; Meason's Estate, 4 Watts, 341; Wells v. Coates, 2 Conn. 567; S. C. 4 Conn. 182; 17 Am. Dec. 115; Knapp v. Williams, 4 Vas. Jr. 430; Tomlinson v. Tomlinson, 9 Beav. 459.

2 Allen v. Pegram, 16 Iowa, 163, 173; Southwestern R. R. Co. v. Thomason, 49 Ga. 458; Johns v. Johns, 1 Ohio St. 350; Dyer v. Caborn, 11 R. (331, 335, 23 Am. Rep. 46); Arnold v. Buzzes, 1 R. I. 175; Tippets v. Weaver, 4 Mass. 595, 596; Cook on Stock & Stockh. § 6; "Stock, its Nature and Transfer," an essay by Henry Budd Jr. Esq., 7 South. L. Rev. (N. S.) 430.

- 3 N. Y. Laws of 1850, ch. 140, § 8.
- 4 8 Vict. ch. 16, § 7.
- 5 *Edwards v. Hall*, 6 De Gex, M. & G. 74.
- 6 *King v. Capper* 5 Price. 217.
- 7 *Douglas v. Congreve*, 1 Keen, 140, 410.
- 8 *Mechanics' Bank v. New York etc. R. R. Co* 13 N. Y. 599, 620; *Wilson v. Little*, 2 N. Y. 443; 51 Am. Dec. 337.
- 9 *New Orleans Nat. Banking Assoc. v. Wiltz*, 10 Fed. Rep. 330; *Cook on Stock & Stockh.* § 6.
- 10 *Freeman v. Appleyard*, 32 Law J. Ex. 175.
- 11 *Dundas v. Dautens*, 1 Ves. 196; *Glogau v. Cooke*, 2 Ball. & B. 230.
- 12 *Tisdale v. Harris*, 37 Mass. 9; *Bartzen v. Nicolay* 53 N. Y. 477; *Cook on Stock & Stockh.* § 333, and cases there cited.
- 13 *Daneuft v. Albrecht* 12 Sm. 189; *Bracey v. Howsaworth* 3 Mee. & W. 422; *Humble v. Mitchell* 11 A. L. & L. 20; *Tempest v. Kellier* 4 Com. D. 243; *Brown & Theohals Railway Law*, 65 *Cook on Stock & Stockh.* §§ 6 & 339, and authorities there enumerated.
- 14 *Allen v. Pegrain*, 16 Iowa, 163, 173; *Chesapeake etc. R. R. Co. v. Paine*, 29 Gratt. 502, 506.
- 15 *Jermain v. Lake Shore etc. R. R. Co* 91 N. Y. 483, 492.
- 16 *Plimpton v. Bigelow* 93 N. Y. 542; *Merchants Mut. Ins. Co. v. Ewer*, 39 Tex. 230; *Cook on Stock & Stockh.* §§ 7 & 480.
- 17 46 & 47 Vict. ch. 52, § 44.
- 18 *Colonial Bank v. Whitney* 11 App. Cas. 426, overruling *Ex parte Union Bank*, Law R. 12 Eq. 354; *Great Eastern Ry. Co. v. Turner*, Law R. Ch. App. 149; *In re Fox*, Law R. 17 Eq. 143.

§ 63. The several kinds of stock defined —
Common stock is that which entitles its holders to an equal *pro rata* division of the profits, if any there be, one shareholder or class of shareholders having no priority, preference or advantage over any other in the division thereof.¹ *Deferred stock* is that upon which the payments of dividends is expressly postponed until some other class of shareholders are paid a dividend, or until some certain obligation or liability of the corporation is satisfied. The other several kinds of stock are *preferred or guaranteed stock*, *interest-bearing stock* and *special stock*, which are defined and discussed in the following sections. *Overissued or spurious stock* is that which is issued in excess of the full amount of

capital stock authorized by the charter of the company.³

1 Cook on Stock & Stockh. § 9.

2 Cook on Stock & Stockh. § 9.

3 Cook on Stock & Stockh. § 9. *Vide infra*, §§ 70-72.

§ 64. Of preferred or guaranteed stock.—Preferred, or, as it is sometimes called, guaranteed stock,¹ is stock upon which the holder is entitled to receive dividends from the earnings of the corporation, before the holders of common stock are entitled to dividends, and before any other dividend can be paid.² A preferred dividend is one which is payable to one class of shareholders in priority to dividends payable to another class;³ and is in the nature of “interest chargeable exclusively upon profits,”⁴ or “a pledge of the funds legally applicable to the purposes of a dividend.”⁵

1 Taft v. Hartford etc. R. R. Co. 8 R. I. 310, 333, 334; 5 Am. Rep. 575. “Guaranteed stock” has, however, in England a different meaning, the word being used to designate stock that is entitled to arrears, while “preferred stock” is not: Henry v. Great Northern R’y Co. 4 Kay & J. 1, 12, 21.

2 Totten v. Tison, 54 Ga. 139; Chaffee v. Rutland etc. R. R. Co. 55 Vt. 110; Henry v. Great Northern R’y Co. 4 Kay & J. 32.

3 Belfast etc. R. R. Co. v. Belfast, 77 Me. 445; Chaffee v. Rutland etc. R. R. Co. 55 Vt. 110; Taft v. Hartford etc. R. R. Co. 8 R. I. 310, 333; 5 Am. Rep. 575.

4 Henry v. Great Northern R’y Co. 1 De Gex & J. 606, 637; 4 Kay, 1; Crawford v. North Eastern etc. R. R. Co. 3 Jur. N. S. 1093.

5 Taft v. Hartford etc. R. R. Co. 8 R. I. 310, 335; 5 Am. Rep. 575.

§ 65. Of the power to issue preferred or guaranteed stock.—The power to issue preferred or guaranteed stock can exist only when expressly conferred by statute or by charter.¹ Where, however, power had been conferred to increase the capital stock in such manner, and subject to such rules, regulations, privileges and conditions as the

company might see fit, it was considered sufficient authority to the corporation to issue preferred stock, although such stock was not expressly designated.¹ And it has been decided also that under a power to increase the capital stock, the corporation by a majority vote may issue preferred stock, the privilege of so doing being founded upon the power of corporations to borrow money,² or to raise funds by the sale of stock.³ So again, preferred stock may be issued for the purpose of exchanging and retiring the common stock.⁴ It is enacted by the English Regulation of Railways Act, 1868, that any company which in the year immediately preceding has paid a dividend on the ordinary stock of not less than three pounds per centum per annum, may, pursuant to the resolution of an extraordinary general meeting, divide their paid-up ordinary stock into two classes, to be and to be called, the one, "preferred ordinary stock," and the other, "deferred ordinary stock," and issue the same subject to certain provisions.⁵ Ordinarily the power of the corporation to issue preferred stock can be exercised only by the shareholders, yet if the directors, without previous authority from the shareholders, issue such stock, their act may be validated by a subsequent ratification by the shareholders.⁶ Even when the corporation has no authority to issue preferred stock, the shareholders may, by acquiescence, be estopped to deny the validity of the issue.⁷ Preferred stock cannot be issued in payment of dividends upon common stock.⁸

¹ Taylor v South et al. R. R. Co. 4 Wood, 575. Sturge v Eastern et al. R. R. Co. 1 D. Gaz. M. & C. 173. But see Harrison v Mexican Ry Co. 41 Tex. J. C. 403. Cf. Hazlhurst v Savannah et al. R. R. Co. 45 Ga. 134. Bates v Andrus et al. R. R. Co. 43 Mo. 421.

2 *Harrison v. Mexican etc. R. R. Co.* Law R. 19 Eq. Cas. 358.

3 *Rutland etc. R. R. Co. v. Thrall*, 35 Vt. 536; *Harrison v. Mexican etc. R. R. Co.* Law R. 19 Eq. Cas. 358. In *Kent v. Quicksilver Mining Co.* 78 N. Y. 159, it is denied that the idea of borrowing is involved in an issue of preferred stock.

4 *Chaffee v. Rutland etc. R. R. Co.* 55 Vt. 110.

5 *Westchester etc. R. R. Co. v. Jackson*, 77 Pa. St. 321. As to exchange of preferred stock for common, see N. Y. Laws of 1880, ch. 225, § 1.

6 31 and 32 Vict. ch. 116, § 13.

7 *McLaughlin v. Detroit etc. R. R. Co.* 8 Mich. 100.

8 *Taylor v. South etc. R. R. Co.* 4 Wood, 575; *Hazelhurst v. Savannah etc. R. R. Co.* 43 Ga. 13. See also *Branch v. Jesup*, 103 U. S. 463.

9 *Hoole v. Great Western R'y Co.* Law R. 3 Ch. 262.

§ 66. **Of dividends upon preferred stock.**—With respect to declaring dividends on common stock, the directors of the corporation have a discretion, but their action with respect to dividends upon preferred stock is subject to review by a court of equity; and where there are funds from which dividends upon preferred stock might have been properly declared, the court will order the payment thereof.¹ Arrears of preferred dividends must be paid before a dividend can be declared upon the common stock.² The same is the rule in England with respect to “guaranteed” stock,³ while the ordinary preferred stock is not in that country entitled to arrears of dividends.⁴ When arrears are recoverable, interest thereon may be recovered also.⁵

1 *Hazeltine v. Belfast & M. H. L. R. R. Co.* 79 Me. 411; *St John v. Erie R'y Co.* 22 Wall. 136; *Bailey v. Railroad Co.* 17 Wall. 96; *Thompson v. Erie R'y Co.* 45 N. Y. 468; *Prouty v. Lake Shore etc. R. R. Co.* 52 N. Y. 563; *Dickinson v. Railroad Co.* 7 W. Va. 390; *Richardson v. Vermont etc. R. R. Co.* 41 Vt. 613; *Rutland etc. R. R. Co. v. Thrall*, 35 Vt. 536; *Barnard v. Vermont etc. R. R. Co.* 89 Mass. 512; *Williston v. Michigan e c. R. R. Co.* 95 Mass. 400; *Taft v. Hartford etc. R. R. Co.* 8 R. I. 310; 5 Am. Rep. 575; *West Chester etc. R. R. Co. v. Jackson*, 77 Pa. St. 321; *Belfast etc. R. R. Co. v. Belfast*, 77 Me. 445; *Bates v. Androscoggin etc. R. R. Co.* 43 Me. 491.

2 *Boardman v. Lake Shore etc. R. R. Co.* 24 N. Y. 157; *Prouty v. Michigan etc. R. R. Co.* 1 Hun, 655; *Lockhart v. Van Alstyne*, 31 Mich. 76; 13 Am. Rep. 156; *Taft v. Hartford etc. R. R. Co.* 8 R. I. 310; 5 Am. Rep. 575.

Elkins v Camden etc. R. R. Co. 36 N J Eq 233, *Contra*, *Belfast etc. R. R. Co. v Belfast*, 77 Me 445; *Hazeltine v. Belfast & M. H. L. R. R. Co.* 77 Me 411.

3 *Henry v Great Northern etc R'y Co.* 1 De Gaz & J 606.
 4 26 & 27 Viet. ch. 16, § 14, *Henry v Great Northern etc R. R. Co.* 1 De Gaz & J 606. Cf. *Dent v London Tramways Co* 16 Ch 344. For a full discussion of this subject, see *Cook on Stock & Stockh.* § 272.
 5 *Boardman v Lake Shore etc. R. R. Co.* 84 N Y 157, *Cook on Stock & Stockh.* § 272.

§ 67. Preferred shareholders not creditors—Preferred shareholders are not creditors, and are entitled to dividends only from profits.¹ A contract to pay dividends on preferred stock, whether any profits are made or no, would be contrary to public policy and void;² for dividends on preferred stock can be paid only out of the *bona-fide* earnings of the company.³

1 *Warren v King*, 109 U S 389; *Belfast etc. R. R. Co. v Belfast*, 77 Me 445; *Chaffee v Rutland etc R. R. Co.* 55 Vt 110; *Taft v Hartford etc. R. R. Co.* 8 R. I 316, 6 Am. Rep 575; *Pittsburg etc. R. R. Co v County of A. J. J. v. A. J. J.* 63 Pa St 126; *Lockhart v Van Alstyne*, 31 Mich 76; *Hates v Andreascoggin etc R. R. Co* 49 Me 491.

2 *Lockhart v Van Alstyne*, 31 Mich 76 (18 Am. Rep. 156), per Cooley.
 3 *Evansville etc R. R. Co v City of Evansville*, 15 Ind 336, *Cook on Stock & Stockh.* § 270.

3 *Union Pacific R. R. Co v United States*, 39 U S 492; *Nichols v New York etc R. R. Co* 15 Fed. Rep 575; *Boardman v Lake Shore etc R. R. Co.* 84 N Y 157; *Thompson v Erie R'y Co* 43 N Y 465; *Prouty v Lake Shore etc R. R. Co.* 52 N Y 363; *Elkins v Camden etc R. R. Co.* 36 N. J. Eq 233; *Belfast etc R. R. Co. v Belfast*, 77 Me 445.

§ 68. Of special stock. —In Massachusetts there is a peculiar kind of stock distinctly provided for by statute, called "special stock,"¹ the characteristics of which are that the corporation is bound to pay a fixed half-yearly sum or dividend upon it as a debt; its holders are in no event liable for the debts of the corporation beyond their stock, all the general stockholders are liable for all the debts and contracts of the corporation until the special stock is fully redeemed; it is subject to redemption at par

after the time designated in the certificate; and it is limited in amount to two-fifths of the actual capital of the corporation.² These statutory requirements are to be strictly complied with, otherwise the issue is invalid.³ The guaranty of dividends upon special stock is absolute and the payment thereof is in no wise dependent upon the earnings of the company.⁴ Special stock can be issued only by a three-fourths vote of the general stockholders at a meeting called for that especial purpose;⁵ and it is essential to the validity of its issue that the record of the meeting, kept by a clerk who has been sworn,⁶ shall show that three-fourths of the general shareholders actually voted for its issue. Nothing will be presumed.⁷

1 Mass. Stats. 1855, ch. 290; 1870, ch. 224, §§ 25, 39, cl. 4; Mass. Pub. Stats. ch. 106, §§ 42, 61, cl. 3.

2 *American Tube Works v. Boston Machine Co.* 139 Mass. 5; the statutes cited *supra*; *Cook on Stock & Stockh.* § 275.

3 *American Tube Works v. Boston Machine Co.* 139 Mass. 5.

4 *Williams v. Parker*, 136 Mass. 204; *Allen v. Herrick*, 81 Mass. 274.

5 Mass. Stats. 1870, ch. 224, § 25; *Reed v. Boston Machine Co.* 141 Mass. 434; *American Tube Works v. Boston Machine Co.* 139 Mass. 5; *Cook on Stock & Stockh.* § 275.

6 Mass. Stats. 1870, ch. 224, §§ 15, 18; Mass. Pub. Stats. ch. 106, §§ 23, 26.

7 *American Tube Works v. Boston Machine Co.* 139 Mass. 5.

§ 69. **Of interest-bearing stock.**—Interest-bearing stock is ordinary common stock upon which the company has promised to pay interest. This interest, however, is regarded as in the nature of a dividend, and its payment can be enforced only when the affairs of the company are in such condition as to admit of dividends being declared and paid. If the agreement on the part of the company be to pay the interest or dividend at all events, whether its earnings be sufficient or no, it is illegal

and void.¹ The holder of interest-bearing stock may participate in the corporate meetings and elections as do the owners of ordinary stock.²

¹ *Troy etc. R. R. Co. v Tibbits*, 18 Barb 237, *Barnard v Vermont etc. R. Co* 39 Mass. 512, *Waterman v Troy etc. R. R. Co.* 74 Mass. 433, *Wright v Vermont etc. R. R. Co.* 65 Mass. 68, *Cunningham v Troy etc. R. R. Co.* 75 Mass. 411, *Richardson v Vermont etc. R. R. Co.* 41 Vt. C. 3, *Edwards R. R. Co. v Threlk.* 3 Vt. 513, *Miller v Pittsburgh etc. R. R. Co.* 40 Pa. St. 237, 5 Am. Dec. 57; *Lockhart v Va. Austyne*, 31 Mich. 7; 18 Am. Rep. 156, *McLaughlin v Detroit etc. R. R. Co.* 89 Mass. 512, *Illinois R. R. Co. v City of Evanston*, 15 Ill. 395, *City of Ohio v Cleveland etc. R. R. Co.* 6 Ohio St. 483, *Painesville etc. R. R. Co. v Knox* 17 Ohio St. 534, *Pittsburgh etc. R. R. Co. v County of Allegheny*, 63 Pa. 120.

² *McLaughlin v Detroit etc. R. R. Co.* 89 Mass. 512.

§ 70. **Of watered or fictitious stock.**—Watered or fictitious stock is that which is issued as fully paid up, when in fact the whole amount of the par value thereof has not been paid to the company.¹ The decisions are conflicting with respect to the legality of the issue of fictitiously paid-up stock. While on the one hand such issues are said to be a fraud upon the law, the stockholders and subsequent purchasers, and contrary to public policy,² on the other hand it has been held that the nature of the transaction is not necessarily fraudulent nor in violation of any principle of public policy, and that as between the corporation and the stockholder it is a perfectly valid transaction,³ although, of course, invalid if it appear that the issue were a device to defraud the public by putting valueless stock upon the market.⁴

¹ *Cook on Stock & Stockh* §§ 9, 21.

² *Barnes v Brown*, 80 N. Y. 527, 534, *obiter*; *Oliphant v Woodhaven etc. Co.* 63 Iowa, 332; *Osgood v King* 42 Iowa, 478, *Tobey v Robinson*, 99 Ill. 222, 228; *ex parte Danke*, 1 DeGex & J. 572.

³ *Schmiller v Thayer*, 135 U. S. 143, *Spring Co. v Knowlton*, 103 U. S. 348, *obiter*; *Finn v Bagley* 7 Fed. Rep. 785, *Lorillard v Clyde*, 86 N. Y. 334, *Otter v Brevort Co.* 50 Barb. 247, *obiter*; *In re Ambrose etc. Co.* 14 Ch. 394, 395.

⁴ *Lorillard v Clyde*, 86 N. Y. 334.

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§ 71. **Constitutional and statutory prohibitions of fictitious stock.**—In several of the American States there are constitutional provisions declaring fictitiously paid-up stock void.¹ In others there are statutes to the same effect.² But these provisions have been construed to be applicable only in case of the issue of entirely fictitious stock, and “not intended to interfere with the usual and customary methods of raising funds by railroad companies for the purpose of building their roads, or of accomplishing other legitimate corporate purposes,”³ such as the issue of stock below par,⁴ or for labor, property, or contract work.⁵ So also, under such a constitutional provision,⁶ it has been held that mortgage bondholders, who buy in the property and franchise of a corporation at a foreclosure sale under their mortgage, are not prohibited from fixing the terms upon which they will surrender those interests; and that they may reorganize upon substantially the same basis, as to capital stock and bonded indebtedness, as that of the old corporation and its predecessor prior to the adoption of the constitutional provision, although under that arrangement they receive both stock and bonds in a large amount, of which the amount of the stock alone is sufficient to cover the full value of the property, rights and privileges of the reorganized company.⁷ In England the issue of stock at a price less than par was formerly forbidden by the Companies’ Clauses Consolidation Act of 1863;⁸ but this was afterwards amended, and at the present time directors may issue stock on such terms as may seem best.⁹

1 Ala. Const. (1875), art. 14, § 6; Ark. Const. (1874), art. 12, § 8; Mo. Const. (1875), art. 12, § 8; Tex. Const. (1876), art. 12, § 6; La. Const. (1879).

§ 238; Cal. Const. (1873), art. 12, § 11; Ill. Const. (1870), art. 11, § 13; Neb. Const. (1875), art. 11, § 5; Pa. Const. (1875), art. 16, § 7.

2 2 N. Y. Rev. Stat. 507, § 49; 534, § 39; 535, §§ 42, 43; N. Y. Session Laws, 1848, ch. 40, §§ 38, 40, 41, 49; Wis. Rev. Stat. (1878), § 1753; Wis. Laws of 1881, ch. 93; Mo. Gen. Stat. ch. 62, § 11. *Cf.* Ohio Rev. Stat. § 3113.

3 *Peoria & S. R. R. Co. v. Thompson*, 103 Ill. 187.

4 *Stein v. Howard*, 65 Cal. 516; *New Castle R. R. Co. v. Simpson*, 21 Fed. Rep. 535.

5 *Peoria & S. R. R. Co. v. Thompson*, 103 Ill. 187.

6 Ark. Const. (1874), art. 12, § 6.

7 *Memphis & L. R. R. Co. v. Dow*, 120 U. S. 327.

8 8 & 9 Vict. ch. 18, § 21.

9 31 & 32 Vict. ch. 48, § 5; *The Railway Companies Act*, 30 & 31 Vict. ch. 137, § 27.

§ 72. **Watered stock not void, but voidable only.**—In the absence, however, of some constitutional or statutory provision declaring fictitiously issued stock to be void, it is not absolutely void, but voidable only, either on the ground of fraud,¹ or on the ground of its issue being an *ultra vires* act, to be questioned only at the instance of persons affected thereby.² Accordingly, at the suit of a dissenting stockholder a court of equity will decree a redelivery of the stock to the corporation for cancellation,³ provided always, of course, that no supervening equities have arisen, as by the sale of the stock to *bona-fide* purchasers for value without notice.

1 *Gilman C. & S. R. R. Co. v. Kelly*, 77 Ill. 426; *Campbell v. Morgan*, 4 Bradw. 100; *Fosdick v. Sturges*, 1 Biss. 255; *Sturges v. Stetson*, 1 Biss. 246.

2 *Fisk v. Chicago, R. L. & P. R. R. Co.* 53 Barb. 513; *Brown's Case*, 2 DeGex, F. & J. 275; *Ex parte Daniell*, 1 De Gex & J. 372; *Cook on Stock & Stockh.* § 29.

3 *Gilman C. & S. R. R. Co. v. Kelly*, 77 Ill. 426. *Cf.* *Sturges v. Stetson*, 1 Biss. 246, *obiter*; *Fosdick v. Sturges*, 1 Biss. 255.

CHAPTER IV.

SUBSCRIPTIONS TO STOCK.

- § 73. The form of the contract of subscription.
- § 74. Of statutory requirements with respect to the form of the contract.
- § 75. Subscription by signing the articles of association.
- § 76. Of subscriptions in escrow.
- § 77. Of subscriptions to stock by parol.
- § 78. Subscription by implication of law.
- § 79. Contracts of subscription are several.
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- § 81. Whether railway companies may subscribe to stock in other railways.
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- § 84. Of the manner of taking subscriptions—By commissioners.
- § 85. When acceptance by the corporation is requisite to bind the subscriber.
- § 86. Of the acceptance and ratification of subscriptions made prior to incorporation.
- § 87. Of the promise to pay.
- § 88. The consideration for the contract—Consideration distinguished from motive.
- § 89. Of payment in property, and of the effect of an extension of credit.
- § 90. Of cash deposits at the time of making the subscription.
- § 91. The subscriber's right to demand a certificate of stock.
- § 92. Of subscriptions in excess of the capital stock.
- § 93. Of agreements to issue shares at less than their face value.

§ 73. The form of the contract of subscription. As a general rule the contract of subscription for the stock of a corporation need not be expressed in formal language, for the courts look to the intention of the contracting parties rather than to the manner in which that intention is manifested.¹ Irreg-

irregularities or defects in the contract of subscription will not render it void, where the paper taken as a whole sufficiently indicates the intention of the contracting parties. Thus an incorrect designation of the *termini* of a railroad, the railroad being otherwise sufficiently described, will not vitiate the subscription.² The intention to subscribe is a question of fact for the jury.³ Accepting a certificate of stock waives all informalities in the contract of subscription.⁴ Non-essential irregularities in the subscription may be cured by legislative enactment.⁵

1 *Dutchess etc. Co. v. Mobbett*, 58 N. Y. 397; *Fry v. Lexington etc. R. Co.* 2 Met. (Ky.) 314; *Mexican Gulf etc. R. R. Co. v. Vivant* 6 Rob. (La.) 45; *Wellesburg etc. R. R. Co. v. Young*, 14 Md. 476. *Oler v. Baltimore etc. R. R. Co.* 41 Md. 583; *Boston etc. R. R. Co. v. Wellington*, 113 Mass. 79; *Oakes v. Turquand*, Law R. 2 H. L. 326.

2 *Cayuga etc. R. R. Co. v. Kyle*, 84 N. Y. 185; *Burlington etc. R. R. Co. v. Palmer*, 42 Iowa, 223; *Boston etc. R. R. Co. v. Wellington*, 113 Mass. 79.

3 *Philadelphia etc. R. R. Co. v. Cowell*, 22 Pa. St. 329; 70 Am. Dec. 128; *Galveston etc. Co. v. Bolton*, 46 Tex. 633.

4 *Hamilton etc. Co. v. Rice*, 7 Barb. 157; *Lone v. Brainerd* 30 Conn. 565.

5 *Rice v. Rock Island etc. R. R. Co.* 31 Ill. 93. See, however, *Richmond etc. Co. v. Clarke*, 61 Mo. 351.

§ 74. Of the statutory requirements with respect to the form of the contract.—When there are statutory requirements with respect to forming the contract of subscription, they should be complied with; but an immaterial departure from the statutory form does not vitiate the contract,¹ provided that there be a substantial *bona-fide* compliance.² For example a subscription on a separate sheet of paper will be valid, although the statute provides for subscription books.³ Likewise a subscription in a small pocket memorandum, without proof of its having been transferred to the books of the com-

pany or having been accepted by the corporation has been held to bind the subscriber.⁴ And it has been held that although the statute provide for subscriptions to be made through commissioners those made in another way are not necessarily void.⁵ But it would seem that where a subscription has not been made in the regular way, it is necessary in order to bind the subscriber thereby that it be accepted and acted upon by the corporation;⁶ notice of acceptance, however, is not requisite in such a case,⁷ unless required by statute.⁸

1 *Peninsular etc. R. R. Co. v. Duncan*, 28 Mich. 130; *Birmingham etc. R'y Co. v. Locke*, 1 Q. B. 256; *London etc. R'y Co. v. Fairclough*, 2 Man & G. 674.

2 *Buffalo etc. R. R. Co. v. Gifford*, 87 N. Y. 294; *Harris v. McGregor*, 29 Cal. 124; *People v. Stockton etc. R. R. Co.*, 45 Cal. 306; 13 Am. Rep. 178; *Brownlee v. Ohio etc. R. R. Co.*, 18 Ind. 68; *Ashtabula etc. R. R. Co. v. Smith*, 15 Ohio St. 328.

3 *Hamilton etc. Co. v. Rice*, 7 Barb. 157; *Mexican Gulf etc. R. R. Co. v. Viavant*, 6 Rob. (La.) 305; *Stuart v. Valley R. R. Co.*, 32 Gratt. 146. In *Woodruff v. McDonald*, 33 Ark. 97, the loose sheets were afterwards bound together in a volume and made a part of the records of the company. *Brownlee v. Ohio etc. R. R. Co.*, 18 Ind. 68; *Ashtabula etc. R. R. Co. v. Smith*, 15 Ohio St. 328; *Iowa etc. R. R. Co. v. Perkins*, 28 Iowa, 281. Cf. *Hawley v. Upton*, 102 U. S. 314; *Bucher v. Dillsburg etc. R. R. Co.*, 70 Pa. St. 306.

4 *Buffalo etc. R. R. Co. v. Gifford*, 87 N. Y. 294; *Brownlee v. Ohio etc. R. R. Co.*, 18 Ind. 68. But see *McClelland v. Whiteley*, 11 Biss. 444.

5 *Buffalo etc. R. R. Co. v. Gifford*, 87 N. Y. 294; *Stuart v. Valley R. R. Co.*, 32 Gratt. 146. *Contra*, *Troy etc. R. R. Co. v. Tibbits*, 18 Barb. 297; *Schurtz v. Schoolcraft etc. R. R. Co.*, 9 Mich. 269. And see *Parker v. Northern etc. R. R. Co.*, 33 Mich. 23.

6 *Ashtabula etc. R. R. Co. v. Smith*, 15 Ohio St. 328.

7 *Brownlee v. Ohio etc. R. R. Co.*, 18 Ind. 68.

8 *Eppes v. Mississippi etc. R. R. Co.*, 35 Ala. 33.

§ 75. Subscription by signing the articles of association.—A valid subscription, binding both upon the person making it and upon the corporation, may be effected by signing the certificate required by law to be filed in order to obtain the charter, and by writing opposite the signature the number

of shares intended to be taken.¹ If the articles of association used for obtaining subscriptions be written in duplicate, as is often the case, and one of these duplicates be filed according to the general incorporation law with the Secretary of State, the question arises whether the subscriptions to the other duplicates, not so filed, have become pledges of the corporation and liable upon the subscriptions. In New York the question has been decided in the negative;² but Mr. Cook, in the discussion of this point doubts the soundness of this decision.³ A person cannot be held bound by a subscription to an incomplete copy of the articles of association,⁴ nor when the names of the directors were left blank and afterwards filled without his concurrence.⁵

1 N. Y. Law of 1850, ch. 140 § 1. *Phoenix etc. Co. v. Balger*, 67 N. Y. 39; S. C. 6 Hun, 295; *Nulton v. Clayton*, 51 Iowa, 425, 37 Am. Rep. 213.

2 *Erie etc. R. R. Co. v. Owen*, 32 Barb. 616.

3 *Cook on Stock & Stocks* § 53.

4 *Dutchess etc. R. R. Co. v. Mabbett*, 58 N. Y. 337; *Bucher v. Dillaburget*, R. R. Co. 76 Pa. St. 336.

5 *Dutchess etc. R. R. Co. v. Mabbett*, 58 N. Y. 337.

§ 76. Of subscriptions in escrow.—A subscription to stock may be made and delivered in escrow. It is held that a delivery of such a subscription to an agent of the company who is taking subscriptions,¹ or to a director,² does not destroy its character as an escrow; but that a delivery to a commissioner will render the contract absolute.³ A subscription delivered in escrow is, strictly speaking, no subscription until the occurrence of the contingency upon which it was to be a second time delivered; and it can only be delivered to the corporation upon the happening of that event.⁴ Parol evidence is

admissible to show that a subscription delivered in escrow was not absolute.⁵ And it may be shown by parol that an agreement with a corporate agent was that the signing of one's name upon a blank sheet of paper should not be a subscription to stock, until the person so signing should see and approve the agreement subsequently to be written above.⁶

1 *Cass v. Pittsburgh etc. R. R. Co.* 80 Pa. St. 31.

2 *Ottawa etc. R. R. v. Hall*, 1 Bradw. 612.

3 *Wright v. Shelby R. R. Co.* 16 Mon. B. 4. *Cf. Price v. Pittsburgh etc. R. R. Co.* 34 Ill. 36.

4 *Ottawa etc. R. R. Co. v. Hall*, 1 Bradw. 612; *Ashtabula etc. R. R. Co. v. Smith*, 15 Ohio St. 323.

5 *Ottawa etc. R. R. Co. v. Hall*, 1 Bradw. 612. *Cf. Jewell v. Rock River etc. R. R. Co.* 101 Ill. 57; *Tonica etc. R. R. Co. v. Stein*, 21 Ill. 96.

6 *Bucher v. Dillsburg etc. R. R. Co.* 76 Pa. St. 306.

§ 77. **Of subscriptions to stock by parol.**—It has been said that a subscription to the capital stock of a corporation cannot be made by parol.¹ Thus one cannot be held liable upon an oratorical declaration at a public meeting of a corporation, to the effect that he would spend half of his estate if need be to insure the success of the scheme.² And it is certain that where a particular form of contract of subscription is prescribed by statute, or by the act of incorporation, a parol contract of subscription is not binding.³ The contract must be in writing, and substantially comply with the statutory provisions.⁴ Where a person made a conditional parol subscription, and wrote his name upon a blank sheet of paper, and the secretary of the company afterwards, without his knowledge, subscribed the name to an unconditional contract of subscription, it did not render the subscriber liable upon the latter contract.⁵

1 *Pittsburgh etc. R. R. Co. v. Gazzam*, 32 Pa. St. 340, *Wood's Railway Law*, § 18.

2 *Andover etc. Co. v. Hay*, 7 Mass. 102.

3 *Phoenix etc. Co. v. Badger*, 67 N. Y. 194; *Galveston etc. Co. v. Bolton*, 45 Tex. 633; *Vreeland v. New Jersey etc. Co.*, 29 N. J. Eq. 184; *Pittsburgh etc. R. R. Co. v. Gazzam*, 32 Pa. St. 340.

4 *Duobess etc. R. R. Co. v. Mabbett*, 58 N. Y. 3-7; *Troy etc. R. R. Co. v. Tibbitts*, 18 Bar. 237; *Troy etc. R. R. Co. v. Warren*, 15 Bar. 310; *Pittsburgh etc. R. R. Co. v. Gazzam*, 32 Pa. St. 340; *Carroll v. Saginaw etc. R. R. Co.*, 27 Mich. 3-5.

5 *Toni & etc. R. R. Co. v. Stein*, 21 Ill. 88. *Cf. Bouch v. Dillsburg etc. R. R. Co.*, 16 Pa. St. 306.

§ 78. **Subscription by implication of law.** Where there has been a defective or irregular subscription, or even where there has been no actual contract of subscription, a person may, by his acts or omissions and by the acquiescence of the corporation, be estopped to deny his liabilities and obligations as a subscriber.¹ For example, merely accepting and holding a certificate of stock is sufficient to subject one to the liabilities of the contract of subscription.² And participation in a stockholders' meeting after organization renders a subscription made prior to incorporation binding.³ So, too, it has been held that serving as a director of a company is an implied subscription for stock to the amount requisite to qualify a person to act in that capacity.⁴ The mere publication, however, of a person's name as one of a board of directors, without his assent and without his participating in the management of the affairs of the corporation, does not estop him to deny that he is a shareholder in an action against him by creditors of the corporation.⁵

1 *Upton v. Tribblecock*, 91 U. S. 45; *Sanger v. Upton*, 91 U. S. 56; *Wheeler v. Millar*, 30 N. Y. 353; *Phoenix etc. Co. v. Bauger*, 67 N. Y. 234; *S. O. Hun*, 2-3; *Dorris v. French*, 4 Hun, 232; *Hamilton etc. Co. v. Rice*, 7 Barb. 153; *Philadelphia etc. R. R. Co. v. Cowell*, 28 Pa. St. 329, 70 Am.

Dec. 128; Cheltenham etc. R'y Co. v. Daniell, 2 Q. B. 781; Cramford etc. R'y Co. v. Lacey, 3 Younge & J. 80.

2 *Upton v. Tribilcock*, 91 U. S. 45; *In re South Mountain etc. R. R. Co.* 7 Sawy 30; *McLoughlin v. Detroit etc. R. R. Co.* 8 Mich. 160. Cf. *Clarke v. Continental etc. Co.* 57 Ind. 135, 138.

3 *Buffalo etc. R. R. Co. v. Gifford*, 87 N. Y. 294.

4 *In re Englefield Colliery Co.* 8 Ch. Div. 338; *De Ravigne's Case*, 5 Ch. Div. 336, 332; *Pearson's Case*, 5 Ch. Div. 336; *McCoy's Case*, 2 Ch. Div. 1, *Hay's Case*, Law R. 10 Ch. 333; *Luke's Case*, Law R. 6 Ch. 43; *Portal v. Emmens*, 1 Com. P. Div. 201, 664.

5 *Hume v. Commercial Bank*, 9 Lea, 728. *Contra*, *Thompson v. Reno Savings' Bank*, 19 Nev. 103; 9 Am. Rep. 797 and note, 806-872. Cf. *McHose v. Wheeler*, 45 Pa. St. 32.

§ 79. Contracts of subscription are several.—An action against subscribers jointly to enforce the payment for stock will not lie, for the contract of subscription is not joint, but several.¹ Accordingly, each contract is to be separately construed and to be in no way affected by the terms of other subscriptions,² and when one person makes two subscriptions in different capacities, as an individual and as a trustee, actions to enforce payment must be brought separately upon each.³

1 *Erie etc. R. R. Co. v. Patrick*, 2 Abb. App. Cas. 72; S. C. 2 Keyes, 255; *Price v. Grand Rapids etc. R. R. Co.* 18 Ind. 137; *Heron v. Vance*, 71 Ind. 695.

2 *Connecticut etc. R. R. Co. v. Bailey*, 24 Vt. 465.

3 *Erie etc. R. R. Co. v. Patrick*, 2 Keyes, 256; S. C. 2 Abb. App. Cas. 72.

§ 80. What persons are competent to subscribe. Ordinarily any natural person competent to make a valid contract, may subscribe to the capital stock of a corporation. Subscriptions to the capital stock of corporations made by infants and married women, by partners and by agents, are usually controlled by the general law of contracts governing the transactions of such persons in other matters.¹ Municipal corporations may be authorized by statute

to subscribe for the stock of private corporations.¹ But as a general rule a private corporation cannot subscribe to the stock of another corporation, the business of which is entirely different from its own.² In Pennsylvania corporations are forbidden by statute to use their funds in the purchase of any stock in other corporations, or to hold the same, except as collateral security for a prior indebtedness;³ and similar statutes are to be found in other States.⁴ But of course there is no rule to prevent a controlling stockholder in one corporation from purchasing a controlling interest in another.⁵ Directors and corporate officers may subscribe for stock in the corporation of which they are officers.⁷ But a corporation cannot subscribe to its own stock.⁸ The commissioners may themselves subscribe for the stock of the company.⁹ Commissioners, however, cannot allow themselves any priority in the subscription for stock. The books must be open, and the public must have an opportunity to subscribe. No subscription can be lawfully taken with closed doors.¹⁰

1 See Cook on Stock & Stockh. §§ 61-66, where these general principles are stated and illustrated.

2 *Sharpless v. The Mayor*, 21 Pa. St. 147; 59 Am. Dec. 769. *Vide infra*, § 185 *et seq*.

3 *Talmage v. Pell*, 7 N. Y. 328; *Franklin Co. v. Lewiston Bank*, 68 Ma. 43; 38 Am. Rep. 9; *Mechanics' Bank v. Meridian Agency*, 24 Conn. 159.

4 Pa. 1 Brightley's Digest, 343, § 39.

5 Tenn. Code (1884), § 2496; Ind. Rev. Stat. (1881), § 3858; Colo. Gen. Stat. (1883) p. 183, § 10, and p. 189, § 33.

6 *Havemeyer v. Havemeyer*, 86 N. Y. 618, 8 O. 45 N. Y. Super. Ct. 464; 8 C. 43 N. Y. Super. Ct. 506; *O'Brien v. Breitenbach*, 1 Hilt. 304.

7 *Sims v. Street R. R. Co.* 37 Ohio, 556; 8 C. 4 Am. & Eng. R. Cas. 132.

8 *Holladay v. Elliott*, 8 Or. 81; *Preston v. Grand Colliery etc. Co.* 11 Minn. 327.

9 *Walker v. Devereaux*, 4 Paige, 229.

10 *Brower v. Passenger R'y Co.* 3 Phila. 161; Cook on Stock & Stockh. § 69.

§ 81. Whether railway companies may subscribe to stock in other railways. — A railway company cannot subscribe for stock in another railway, without obtaining express legislative authority;¹ and such an authority is not to be implied by a grant of power to lease other roads.² Neither can a railway company indirectly through its agents subscribe for the stock of another railway.³ The General Railroad Act of New York declares with respect to companies formed thereunder that it shall be unlawful for such companies to use any of their funds in the purchase of any stock in their own, or in any other corporation;⁴ but a railroad that has leased another may exchange its stock for the stock of the other.⁵ And any railway company in New York may subscribe to the stock of the Great Western Railway of Canada.⁶ In several states there are statutes authorizing railways to subscribe under certain restrictions to the stock of other railway companies.⁷ In Kansas a railway company may purchase shares of stock in a connecting line for the purpose of consolidation.⁸

1 *Central R. R. Co. v. Collins*, 40 Ga. 582; *Hazellhurst v. Savannah etc. R. R. Co.* 43 Ga. 13, 57; *Central R. R. Co. v. Pennsylvania R. R. Co.* 31 N. J. Eq. 475, 494; *Elkins v. Camden etc. R. R. Co.* 38 N. J. Eq. 5; *Salomons v. Laing* 12 Beav. 339; *Maunsell v. Midland etc. R'y Co.* 1 Hem. & M. 130; *Great Northern R'y Co. v. Eastern Counties R'y Co.* 21 Law J. Ch. 637; *Of S. Viet.* ch. 16, § 65; *Angell & Ames on Corporations*, § 292; *Green's Brices Ultra Vires*, (2d ed.) 91; *Cook on Stock & Stockh.* § 315.

2 *Salomons v. Laing*, 12 Beav. 339, 353.

3 *Pearson v. Concord R. R. Co.* (1863) — N. H. —

4 N. Y. Laws of 1850, ch. 140, § 8.

5 N. Y. Laws of 1867, ch. 254, as amended by Laws of 1873, ch. 502.

6 *White v. Syracuse etc. R. R. Co.* 14 Barb. 552.

7 Ohio Act of March 3d, 1851, § 4; *White v. Syracuse etc. R. R. Co.* 14 Barb. 552; Md. Laws of 1836, ch. 216, granting the privilege to the Baltimore & Ohio R. R. Co.; *Mayor v. Baltimore etc. R. R. Co.* 21 Md. 50.

8 *Ryan v. Leavenworth etc. R'y Co.* 21 Kan. 365.

§ 82. **Of the manner of taking subscriptions - The New York method.** Under the General Railroad Act of New York, each subscriber to the articles of association shall subscribe thereto his name, place of residence, and the number of shares of stock he agrees to take in the company.¹ When the articles of association and affidavit have been filed and recorded in the office of the Secretary of State, in case the whole capital stock is not before subscribed, the directors named in the articles of association may open books of subscription to fill up the capital stock of the company, in such places and after giving such notice as they may deem expedient, and may continue to receive subscriptions until the whole capital stock is subscribed. At the time of subscribing, every subscriber is required to pay the directors, in money, ten per cent. on the amount subscribed by him; and no subscription can be legally received or taken without such payment.² The directors may require subscribers to pay the amount subscribed in such manner and in such installments as they may deem proper; and after having given notice sixty days before the day on which the payment is required to be made, that a failure to pay will work a forfeiture of the stock and of all previous payments, the directors may, upon the subscriber's failure to pay, declare his stock and all previous payments forfeited for the use of the company.³ Directors are personally liable for refusal to receive subscriptions.⁴

1 N Y Laws of 1850, ch. 140, § 1.

2 N Y Laws of 1850, ch. 140, § 4.

3 N Y Laws of 1850, ch. 140, § 7.

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4 *Union Bank v. McDonough*, 6 La. 63. *Contra*, *Ferguson v. Wilson*, Law R. 2 Ch. 77. *Cf.* *Swift v. Jewsbury*, Law R. 2 Q. B. 381.

§ 83. Of the manner of taking subscriptions.—**The English method.**—The contract of subscription in England is entered into by a written application by the subscriber to the company for an allotment of a specified number of shares. This application, until accepted by the corporation, remains merely an open offer, revocable by the maker at any time,¹ either in writing or by parol.² In order to conclude the contract and bind the applicant, the company must formally accept his offer by allotting to him the specified number of shares, and notifying him thereof, the notification being of the essence of the contract.³ For an allotment in pursuance of an offer to take shares does not constitute a binding contract without notice to the allottee.⁴ As in other contracts, the offer must be accepted, if at all, within a reasonable time.⁵ If within a reasonable time after the application for shares a letter notifying the applicant of the allotment be posted by the company, the contract is thereby concluded, and dates from the mailing of the notice,⁶ whether the letter ever reaches the allottee or no,⁷ or if the applicant become cognizant of the fact of allotment by other means, and has acted or permitted others to act upon the assumption of his being a share-owner.⁸ But the words in the Companies' Clauses Act, "and whose name shall have been entered on the register of shareholders,"⁹ are held to be descriptive merely, and not to make registration a condition precedent to liability as a shareholder.¹⁰

1 *Ramsgate etc. Co. v. Montefiore*, Law R. 1 Ex. 109; *In re Bowron*, Law R. 5 Eq. 428.

2 *Wilson's Case*, 20 Law T. N. S. 962.

3 *In re Peruvian Ry Co.* Law R. 4 Ch. 322; *Webb's Case*, Law R. 4 Eq. 9; *Ward's Case*, Law R. 10 Eq. 659. *Contra*, *Burke v. Lechners*, Law R. 6 Q. B. 397; *Thames Tunnel Co. v. Sheldon*, 6 Barn. & C. 341.

4 *Pollatt's Case*, 2 Ch. 527; *Gunn's Case*, 3 Ch. 49. Notice to an agent of the company is not notice to the allottee. *Hebb's Case*, Law R. 4 Eq. 9.

5 *Ward's Case*, Law R. 10 Eq. 659.

6 *Dunlop v. Higgins*, 1 H. L. Cas. 381; *Harris's Case*, Law R. 7 Ch. 587.

7 *Harris's Case*, Law R. 7 Ch. 587; *Household Fire Co. v. Grant*, 48 Law J. Ex. 219; S. C. 4 Ex. Div. 216; *Townsend's Case*, Law R. 13 Eq. 148; *Steel's Case*, 28 Week. R. 241. See, however, *British & American Telegraph Co. v. Colson*, Law R. 6 Ex. 108.

8 *In re Peruvian Ry Co.* Law R. 4 Ch. 322; *Cook on Stock & Stocks* § 57, and cases there cited.

9 8 Vict. ch. 16, § 8.

10 *Wolverhampton etc. Co. v. Hawkesford*, 7 Com. B. N. S. 793, 814; *Portal v. Emmons*, 1 Com. P. 301, 664.

§ 84. Of the manner of taking subscriptions.—
By commissioners.—In many cases the act of incorporation provides for the appointment of commissioners before whom subscriptions to the capital stock of the company are to be made. In such cases the organization of the corporation cannot be effected until the commissioners have received the subscriptions and allotted the shares.¹ These commissioners have only such general powers as are requisite to render valid the subscriptions made through them; and upon the organization of the corporation their powers and duties are determined.² Commissioners appointed under a statute to take subscriptions and to make distribution and allotment of shares, in the performance of the former duty exercise a ministerial function, in the latter a judicial; and when acting judicially, it is essential that all of them be present, otherwise the distribution of shares is void.³ When the amount of stock to be subscribed is not fixed by statute, it is

usually in the discretion of the commissioners to determine what amount is sufficient.⁴ Independent of express authority in the statute under which they are appointed, commissioners have authority to limit the number of shares which a single subscriber may be allowed to take.⁵ The failure of the commissioners to take the oath prescribed for them by the statute does not invalidate subscriptions taken by them and in all respects regular.⁶

1 *Walker v. Devereaux*, 4 Paige, 229.

2 *Walker v. Devereaux*, 4 Paige, 229; *Croker v. Crane*, 21 Wend. 211, 34 Am. Dec. 228; *Peninsular etc. R. R. Co. v. Duncan*, 23 Mich. 130; *James v. Cincinnati etc. R. R. Co.* 2 D. Sney, 261, *Cook on Stock & Stockh.* § 59.

3 *Croker v. Crane*, 21 Wend. 211; 34 Am. Dec. 228. In *Penobscot etc. R. R. Co. v. W. & L.*, 41 Me. 512, 86 Am. Dec. 257, a majority of the commissioners was declared a quorum for the transaction of business.

4 *Saugatuck etc. Co. v. Westport*, 39 Conn. 337, 343.

5 *Brower v. Passenger R'y Co.* 3 Phila. 181; *Perkins v. Savage*, 15 Wend. 412.

6 *Hollman v. Williamsport etc. R'y Co.* 9 Gill & J. 462.

§ 85. When acceptance by the corporation is requisite to bind the subscriber.—It would seem that the true criterion by which to determine the subscriber's liability is whether or no the corporation likewise is bound;¹ and inasmuch as the corporation is not bound to accept every subscription to its stock made in any manner whatever, neither can the subscriber be held accountable until his subscription has been accepted and recognized in some way by the corporation.² Thus, for example, subscriptions taken by a person unauthorized to receive them can not be enforced unless subsequently accepted by the company,³ for the corporation may reject subscriptions taken by an unauthorized agent.⁴ Accordingly, it has been held in Michigan that subscriptions are binding upon the subscriber

only when the corporation also is bound, to wit, when the contract is mutual; that therefore, as in that State, the statute imposes no obligation upon the corporation except by subscriptions regularly made, neither is the subscriber bound by an irregular subscription unless there were some actual consideration or agreement binding the company.⁴ In a case in which the statute of incorporation enacted that subscriptions to the stock of a railway should only be made in the manner to be provided in its by-laws, subscriptions prior to the adoption of by-laws were held not enforceable, although the by-laws subsequently passed expressly ratified them.⁵ And it would seem, wherever a subscription has been made in an irregular way, as on separate sheets of paper or in memorandum books, when the statute requires them to be made in the subscription books of the company, it is requisite to their validity and binding effect upon the subscriber that they be accepted and acted upon by the corporation.⁷

1 *Panning v Insurance Co*, 37 Ohio St. 539; 41 Am. Rep. 517; *Thames Tunnel Co. v Shaddon*, 6 Barn. & C. 341.

2 *Sewall v Eastern R. R. Co* 9 Cush. 5; *Parker v Northern etc. R. R. Co* 33 Mich. 23; *Carls v Saginaw etc. R. R. Co* 27 Mich. 315; *Clarke v Continental etc. Co*, 57 Ind. 130; *St. Paul etc. R. R. Co v Robbins*, 23 Minn. 429; *G. I. etc. Ry. Co v Neely*, 64 Tex. 344; *Brownlee v Ohio etc. R. R. Co* 18 Ind. 72; *New Albany etc. R. R. Co v McCormick*, 10 Ind. 499; 71 Am. Dec. 337. Cf. *Silphery v Earhart*, 83 Ind. 178; *Cincinnati etc. R. R. Co. v Pearce*, 28 Ind. 205.

3 *Walker v Mobile etc. R. R. Co*, 34 Miss. 245.

4 *Walker v Mobile etc. R. R. Co*, 34 Miss. 245; *Taggart v Western etc. R. R. Co* 24 Mo. 503, 89 Am. Dec. 760; *Mobile etc. R. R. Co v Yandal*, 5 Sneed (Tenn.) 24; *Me v n v Hutt*, 52 N. H. 61. Compare, as to acceptance of such subscriptions, *Mansfield etc. R. R. Co v Brown*, 26 Ohio St. 223, where it is held that acceptance may be shown by parol.

5 *Parker v. Northern etc. R. R. Co*, 33 Mich. 23; *Wood's Railway Law*, § 20.

6 *Carlisle v. Saginaw etc. R. R. Co*, 27 Mich. 315; S. C. 10 Am. R'y Rep. 283.

7 *Ashtabula etc. R. R. Co. v. Smith*, 15 Ohio St. 338; *Brownlee v. Ohio etc. R. R. Co.*, 18 Ind. 68; *Epper v. Mississippi etc. R. R. Co.*, 35 Ala. 33.

§ 86. **Of the acceptance and ratification of subscriptions made prior to incorporation.**—The weight of authority decides that an agreement between several persons to take stock in a projected corporation enures to the benefit of the company upon its incorporation, and that immediately upon organization it acquires a vested interest in the preliminary contract of subscription.¹ There are other cases, however, which hold that where several persons enter into an agreement among themselves to take stock in a projected corporation, which at the time had not come into existence, the subsequently incorporated company cannot enforce the agreement, on the ground that it cannot be considered a party to a contract made prior to the beginning of its corporate existence,² and that a subscriber is at liberty to withdraw at any time before the filing of the articles of association, that is to say, before the incorporation of the company;³ provided, of course, that no supervening equities have arisen, such as the inducement of others to subscribe, or the contraction of debts on the faith of his subscription.⁴ On this principle such preliminary subscriptions are said to be mere continuing offers to take stock upon the organization of the corporation, which must be accepted by the company before an action will lie.⁵ But all the authorities are agreed that a subscription made prior to incorporation will bind a subscriber who has paid for one of his shares,⁶ or paid calls,⁷ or merely accepted the shares,⁸ or who has participated in an election,⁹ or in any way acquiesced in the validity of his subscription.¹⁰ Although the

- 3 Bell's Appeal (1867) 115 Pa. St. 86.
- 7 Maltby v Northwestern etc. R. R. Co. 16 Md. 422.
- 8 Inter-Mountain etc. R. R. Co. v Jack, 5 Mont. 568.
- 9 Rockville etc. Co. v. Van Ness, 2 Cranch C. C. 449.
- 10 Kansas City Hotel Co. v Hunt, 57 Mo. 126.
- 11 Thrasher v. Pike County etc. R. R. Co. 25 Ill. 393; Rhey v Ebensburg etc. R. R. Co. 27 Pa. St. 261. Cf. Mt. Sterling etc. R. R. Co. v. Little, 14 Bush, 429; Ottawa etc. R. R. Co. v Black, 79 Ill. 93.
- 12 Lake Ontario etc. R. R. Co. v Curtiss, 80 N. Y. 219.
- 13 Troy etc. R. R. Co. v Tibbits, 18 Barb. 237; Troy etc. R. R. Co. v. Warren, 18 Barb. 313; Thrasher v Pike County R. R. Co. 25 Ill. 393; Charlotte etc. R. R. Co. v Blakely, 3 Strob. 246.
- 14 Mt. Sterling Coal Road Co. v. Little, 14 Bush, 429.

§ 87. **Of the promise to pay.**—The prevailing rule is that a subscription for shares of stock implies a promise to pay for them;¹ even though the corporation may have the right to forfeit the shares upon a failure to pay.² For, it is said, the remedy of forfeiture is cumulative merely, and the corporation may waive the right to forfeit and elect to enforce the contract of subscription.³ "Whatever may be the form or language of a subscription to the stock of an incorporated company, any person who in any manner becomes a subscriber for, or engages to take any portion of the stock of such company, thereby assumes to pay according to the conditions of the charter."⁴ The liability of a shareholder to pay for stock does not arise out of the relation between him and the corporation; but depends either upon some statute fixing his liability, or upon an express or implied promise on his part to pay therefor. Accordingly, one to whom shares have been issued as a gratuity, does not, by accepting them, become liable for their face value as upon a contract of subscription.⁵ In those States where the rule prevails that these subscriptions may be specifically enforced, it is

held unnecessary thereto that the corporation should have formally accepted the subscriptions.⁴ In some courts it has been decided that subscriptions to stock cannot be enforced, in the absence of statutory authority to the corporation to sue, unless there has been an express promise by the subscriber to pay for the shares.⁵ In Massachusetts and Maine and in Vermont, no action will lie unless there has been an express promise to pay.⁶

1 *Hawley v. Upton*, 102 U. S. 314; *Rensselaer etc. R. R. Co. v. Barton*, 16 N. Y. 457; *Lake Ontario etc. R. R. Co. v. Mason*, 13 N. Y. 751; *Ogdensburg etc. R. R. Co. v. Frost*, 21 Barb. 541; *Clase v. P. Road Co.* 5 La. 415; *Hartford etc. R. R. Co. v. Grosvenor* 51 Ill. 3, 40 A. Dec. 354; *Norfolk etc. R. R. Co. v. Miller* 19 Barb. 26; *Pepper Lake etc. R. R. Co. v. Mott* Ky. 314; *Turno v. Chawson etc. R. R. Co.* 3 A. 660; *Buckfield etc. R. R. Co. v. Irish*, 39 Me. 44; *Kennebec etc. R. R. Co. v. Palmer*, 31 Me. 26; *Waukon etc. R. R. Co. v. Dwyer*, 49 Iowa, 121; *Danbury etc. R. R. Co. v. Wilson* 22 Conn. 435; *Connecticut etc. R. R. Co. v. Badger*, 24 Vt. 466, 53 Am. Dec. 181.

2 *Dexter etc. Co. v. Milled*, 3 Mich. 91; *Hughes v. Antietam etc. Co.* 34 Md. 316.

3 *Price v. Grand Rapids etc. R. R. Co.* 18 Ind. 137; *Herron v. Vance*, 7 Ind. 597; *Thomson v. Reno Savings' Bank*, 19 Nev. 103, 3 Am. Rep. 797 and note, 306-822.

4 *Rensselaer etc. Co. v. Barton*, 16 N. Y. 460.

5 *Christensen v. Eno* (1887), 106 N. Y. 97, 60 Am. Rep. 429.

6 *Lake Ontario etc. R. R. Co. v. Mason*, 13 N. Y. 451; *Buffalo etc. R. R. Co. v. Dunay*, 11 N. Y. 335; *Norfolk etc. R. R. Co. v. Miller* 19 Barb. 160; *Buffalo etc. R. R. Co. v. Clark*, 22 Hun 359; *Hughes v. Antietam etc. Co.* 34 Md. 316; *Pepper Lake etc. R. R. Co. v. Dunbar* 40 Me. 172, 63 Am. Dec. 634; *Contra Starrett v. Rockland etc. R. R. Co.* 65 Me. 371.

7 *Pittsburgh etc. R. R. Co. v. Gazzam*, 32 Pa. St. 340, where a statute authorizing suits was declared unconstitutional; *Belfast etc. R. R. Co. v. Cottrell*, 63 Me. 185; *Kennebec etc. R. R. Co. v. Kendall*, 31 Me. 470; *Katona Land Co. v. Holley*, 120 Mass. 540.

8 *Boston etc. R. R. Co. v. Wellington*, 113 Mass. 73; *Belfast etc. R. R. Co. v. Cottrell*, 63 Me. 185; *Belfast etc. R. R. Co. v. Milled*, 3 Mich. 91; *Me. 56*; *Buckfield etc. R. R. Co. v. Irish*, 39 Me. 44; *Kennebec etc. R. R. Co. v. Kendall*, 31 Me. 470; *Connecticut etc. R. R. Co. v. Barton*, 24 Vt. 465, 53 Am. Dec. 181; *New Hampshire etc. R. R. Co. v. Johnson*, 39 N. H. 390, 64 Am. Dec. 300.

§ 88. The consideration for the contract of subscription. Consideration distinguished from motive.—A subscription to the capital stock of a

company, from the membership of which a shareholder may derive pecuniary advantages, gives to the subscriber such an interest as will be a sufficient consideration to support a promise to pay for the shares. Such an enterprise is a combination of means for mutual profit, and is in no sense a gift or promise without consideration. The advantages to be derived from being a member of such a company, and of the consequent right to participate in the pecuniary dividends, is a positive benefit, and where the agreement secures that advantage to the subscriber, on the organization of the company, the objection of a want of consideration cannot be made with success.¹ Various other considerations have been held to support the contract—the mutual promises of the subscribers;² the implied promise on the part of the corporation to issue the stock;³ the prior proceedings and acts of the parties, and the partial execution of the purpose designed by the charter.⁴ Again, it is said that the consideration to sustain such a promise is raised by inference of law from the subscription itself, and the privileges thereby conferred; and that from the same circumstance the law will infer a duty to pay for the stock, and an implied obligation of equal force with an express contract.⁵ The legal consideration for a contract of subscription is to be carefully distinguished from the motive by which the subscriber was governed. Thus the motive of the defendant in subscribing may have been to secure a road where he supposed the one in question was to be located. The consideration of his subscription was the stock

to which the payment would entitle him. And accordingly, where the location of the line was different from what he had hoped, there was no failure of consideration.⁰

1 *Lake Ontario etc. R. R. Co. v. Mason*, 16 N. Y. 451, 463; *Buffalo etc. R. R. Co. v. Dudley*, 14 N. Y. 336; *Schenectady etc. R. R. Co. v. Thatcher*, 11 N. Y. 102, 108; *Thigpen v. Mississippi Central R. R. Co.* 33 Miss. 348; *New Albany etc. R. R. Co. v. Fiala*, 10 Ind. 187; *Selma et. R. R. Co. v. Tipton*, 5 Ala. 787; 39 Am. Dec. 344; *Fry v. Lexington etc. R. R. Co.* 2 Est. (Ky.) 314; *Hartford etc. R. R. Co. v. Kennedy*, 13 Conn. 439. Cf. *East Tennessee etc. R. R. Co. v. Gammon*, 5 Sneed, 567; *Danbury etc. R. R. Co. v. Wilson*, 23 Conn. 435.

2 *Bullock v. Falmouth etc. Turnpike Co.* (1887), 85 Ky. 184; *Twins Creek etc. Co. v. Lancaster*, 79 Ky. 652.

3 *St. Paul etc. R. R. Co. v. Robbins*, 23 Minn. 439.

4 *Kennebec etc. R. R. Co. v. Palmer*, 34 Me. 366. Cf. *McCally v. Pittsburgh etc. R. R. Co.* 32 Pa. St. 25. And see Cook on Stock & Stockh. § 70.

5 *East Tennessee etc. R. R. Co. v. Gammon*, 5 Sneed, 567; *Cole v. Ryan*, 88 Barb. 63.

6 *Miller v. Wild Cat etc. Co.* 52 Ind. 51, 64; *Parker v. Northern etc. R. R. Co.* 33 Mich. 23; *Illinois River R. R. Co. v. Zimmer*, 20 Ill. 654.

§ 89. Of payment in property, and of the effect of an extension of credit.—Ordinarily a corporation may accept in payment of shares of stock any property of a kind which it is authorized to purchase.¹ In the absence of fraud, although such property was accepted at an overvaluation, a receiver cannot maintain an action at law against the subscriber to collect the difference between the alleged actual value thereof and the valuation at which it was received in payment for the stock.² A corporation does not, by extending a reasonable credit to a subscriber for the payment of the purchase-money, lose the right to enforce the contract against him.³ But the subscription is void when the corporation has contracted with the subscriber to allow him an indefinite time in which to pay for his shares.⁴

1 *Coffin v. Ransdell* (1887), 110 Ind. 417.

2 *Coffin v. Ransdell*, 110 Ind. 417. This subject is treated more fully in the chapter on the ISSUE OF STOCK.

3 *Mitchell v. Beckman*, 64 Cal. 117.

4 *Van Allen v. Illinois etc. R. R. Co.* 7 Bosw. 515.

§ 90. Of cash deposits at the time of making the subscription.—If the charter or by-laws of the corporation require a certain part of the amount subscribed to be paid in cash at the time the subscription is made, and no such payment is made, the subscriber cannot be held liable upon the contract.¹ But although a part payment in cash be required at the time of subscription, a check upon the subscriber's bank account,² and his promissory note, negotiated by the company and met by the subscriber at maturity, have been held equivalent to a cash payment.³ And it is even affirmed that although the statutory requirement that a certain amount be paid at the time of subscription, has not been complied with, the subscriber cannot take advantage thereof to evade liability upon his contract, such provisions being directory rather than mandatory.⁴ In England the authorities are conflicting. Some cases hold that a person who has become a shareholder is liable upon his stock notwithstanding a provision in the act of incorporation prohibiting the issue of shares and declaring that no title shall vest in the person accepting them until a certain amount has been paid thereon. The effect of such a provision is held only to prevent the shareholder from transferring his liability as between himself and the company until the statute has been complied with and the required payment made.⁵ In other cases in which it

was forbidden to issue any share till the payment of twenty per cent. on the nominal value, and the company issued scrip certificates on which ten per cent. was paid, it was held that the company could not compel the allottee of such scrip certificates to become a shareholder, and that his name should be removed from the register if improperly inserted.⁴ If a subscriber has advanced money to the promoters of a company, in good faith, as a deposit or assessment upon the shares to be issued to him, and the company for any reason fails to be incorporated, he may recover the amount so advanced,⁵ without deduction of any part thereof expended in the promotion of the scheme.⁶

1 *Beach v. Smith*, 30 N. Y. 116; *Black River etc. R. R. Co. v. Clark*, 35 N. Y. 208; *Crocker v. Crane*, 21 Wend. 211; 34 Am. Dec. 228.

2 *In re Staten Island Rapid Transit R. R. Co.* 37 Hun. 422; *People v. Stockton etc. R. R. Co.* 45 Cal. 306; 13 Am. Rep. 178. *Cf. Collins v. Coe*, 117 Mass. 45.

3 *Ogdenburg etc. R. R. Co. v. Woolley*, 3 Abb. App. Dec. 328. See, also, *Vermont Central R. R. Co. v. Clays*, 21 Vt. 30, 8 U. 1 Am. R. R. Cas. 226, where a note payable on demand was given in lieu of the statutory deposit of five dollars on each share. *Cf. East New York etc. R. R. Co. v. Lightman & Robt.* (N. Y.) 407.

4 *Lake Ontario etc. R. R. Co. v. Mason*, 16 N. Y. 451. *Cf. Black River etc. R. R. Co. v. Clark*, 35 N. Y. 208; *Hall v. Selma etc. R. R. Co.* 6 Ala. 741.

5 *East Gloucester R'y Co. v. Bartholomew*, Law R. 3 Ex. 15; *Purley's Case*, 16 Week R. 666; *McEuen v. West London etc. Co.* 6 Ch. 635.

6 *Eustace v. Dublin Trunk R'y Co.* 6 Eq. Cas. Abr. 182; *McElwraith v. Dublin Trunk R'y Co.* 7 Ch. 134.

7 *Nockels v. Crosby* 2 Barn. & C. 814; *Colt v. Woollaston*, 2 P. Wins. 154; *Williams v. Salmon*, 2 Kay & J. 463. *Cf. Grand Trunk etc. R'y Co. v. Brodie*, 9 Hare, 823, 6 Geo. I. ch. 18, called the "Bubble Act."

8 *Nockels v. Crosby*, 2 Barn. & C. 814. *Contra, Williams v. Salmon*, 2 Kay & J. 463.

§ 91. The subscriber's right to demand a certificate of stock.—It is not essential to the validity of the contract of subscription that a certificate of stock be issued to a subscriber,¹ for, as was stated

in a foregoing section, the title of the shareholder, and his right to vote and to receive dividends, is quite independent of the certificate of stock.¹ But if a subscriber during the solvency of the corporation tender the full amount of his subscription, demanding the issue of a certificate, and the company declines the tender without legal cause, and refuses to issue the certificate, the subscriber is released from all liability, even as against the assignee of the company upon insolvency.² Or for a refusal to issue a certificate of stock, the subscriber has his action in assumpsit for the value of the stock at the time that he demanded it; or by a bill in equity he may enforce the specific performance of the contract,³ provided of course that the full amount of the capital stock has not been taken. But if all the stock has been issued, the subscriber's only remedy is in assumpsit.⁴ Under a statute declaring that when any subscriber shall make full payment for his stock, the corporation shall issue him a certificate of stock, it is held that no certificate can be demanded until the amount of his subscription be paid.⁵

1 *Hawley v. Upton*, 102 U. S. 314; *Buffalo etc. R. R. Co. v. Dudley*, 14 N. Y. 336, 347; *Mitchell v. Beckman*, 64 Cal. 117; *New Albany etc. R. R. Co. v. McCormick*, 10 Ind. 499; 71 Am. Dec. 337, n.

2 *Supra*, § 61.

3 *Potts v. Wallace*, 33 Fed. Rep. 273.

4 *Wyman v. American Powder Co.* 8 Cush. 163. *Cf. Swazy v. Choate etc. Co.* 43 N. H. 200.

5 *Ferguson v. Wilson*, Law R. 2 Ch. 77.

6 *Finley etc. Co. v. Kurtz*, 34 Mich. 89. As to measure of damages, see *Van Allen v. Illinois etc. R. R. Co.*, 7 Bosw. 515; *Baltimore etc. R. R. Co. v. Sewall* 35 Md. 238; 6 Am. Rep. 402.

7 *Sporlock v. Missouri Pacific R'y Co.* (1887), 90 Mo. 199.

§ 92. Of subscriptions in excess of the capital stock.—As a general rule subscriptions in excess of

the amount limited as the capital stock of the corporation are void;¹ and no liability thereon attaches to a subscriber to whom stock in excess of the amount authorized has been issued.² Where subscriptions are taken by commissioners, however, the act of incorporation often vests them with a discretion in the distribution of the shares, and in case of subscriptions in excess of the capital stock, they may allot to each subscriber such a proportion of the whole capital stock as the amount of his subscription bears to the whole amount subscribed, and no subscription will then be entirely void.³ Equity will grant relief against the failure of the commissioners to make a proper apportionment.⁴ But in the absence of an express statutory authority, the commissioners have no implied power to apportion an excess of subscriptions.⁵ When the act of incorporation makes provision for the apportionment of the subscriptions, the contract of subscription is not complete until the apportionment has been made.⁶

1 *Burrows v. Smith*, 10 N. Y. 550; *Lathrop v. Kneeland*, 48 Barb. 432; *Oler v. Baltimore etc. R. R. Co.*, 41 Md. 533.

2 *Clark v. Turner*, 73 Ga. 1.

3 *Buffalo etc. R. R. Co. v. Dudley*, 14 N. Y. 336. *Cf. Danbury etc. R. R. Co. v. Wilson*, 29 Conn. 435, 454.

4 *Walker v. Devereaux*, 4 Paige, 229.

5 *Van Dyke v. Stout*, 8 N. J. Eq. 333. *Cf. Croker v. Crane*, 21 Wend. 311, 34 Am. Dec. 228.

6 *Burrows v. Smith*, 10 N. Y. 550; *Croker v. Crane*, 21 Wend. 311; 34 Am. Dec. 228, *Walker v. Devereaux*, 4 Paige, 229. *Cf. Buffalo etc. R. R. Co. v. Dudley*, 14 N. Y. 336, 346.

§ 93. Of agreements to issue shares at less than their face value. —An agreement between a subscriber and the corporation that an amount less than the face value of the stock shall be accepted

in full payment therefor, does not, as against creditors, release the subscriber from liability upon the full par value of the shares.¹ Thus a contract of subscription by which a corporation agrees to issue full-paid stock upon the payment of forty per centum of the par value thereof, does not relieve a subscriber from liability to the corporate creditors for the remaining sixty per centum.² Yet in a recent case, where subscribers had been required to pay calls in excess of the amount expected and represented to them as necessary at the commencement of the enterprise, and the corporation to make good their loss issued to them, as a gratuity, stock credited with a payment of forty per centum, which as a matter of fact had not been paid, it was held that corporate creditors could not compel the holders of such stock to account for the unpaid forty per centum as though they had been subscribers therefor.³ The rule that a stipulation exempting the holders of stock from payment of the full par value thereof is void as against creditors, has been held not to apply in a case in which certain persons to whom a railway company was indebted accepted in good faith the stock of the company at twenty cents on the dollar, in satisfaction of their claims, the arrangement being beneficial to the company and due publicity being given thereto by spreading the terms of the transaction upon the corporate minutes.⁴ For when the strict construction of a statute prohibiting attempted exemptions from the full payment⁵ for shares of stock, will work a positive injury to creditors for whose protection it was intended, the court will apply a liberal construction in accordance with the spirit of the enactment.⁶ In

England the issue of stock for less than the full nominal amount of any share was prohibited by the Companies' Clauses Act of 1863;⁶ but this restriction has since been removed by the Railway Companies Act of 1867,⁷ and by the Companies' Clauses Act of 1869.⁸ A subscriber who has contracted with a company to take fully paid-up shares cannot be made liable to the company or its creditors for shares not fully paid-up registered in his name.⁹

1 *Hawley v Upton*, 102 U. S. 314; *Hatch v. Dana*, 101 U. S. 206; *Pallman v Upton*, 95 U. S. 323; *Upton v. Tribilcock*, 91 U. S. 45; *Flinn v Bagley*, 7 Fed. Rep. 7-6; *Sturgiss v. Stetson*, 1 Bls. 246; *Pittsburg etc. R. R. Co. v. Stewart*, 41 Pa. St. 64.

2 *Great Western etc. Co. v. Gray* (1887), 123 Ill. 630.

3 *Christensen v. Eno* (1837), 100 N. Y. 97; 60 Am. Rep. 429.

4 *Clark v. Bever*, 31 Fed. Rep. 670.

5 *Clark v. Bever*, 31 Fed. Rep. 670.

6 26 & 27 Vict. ch. 113, § 21.

7 30 & 31 Vict. ch. 127, § 27.

8 32 & 33 Vict. ch. 48, § 5.

9 *Ashworth v. Bristol etc. Ry Co.*, 15 Law T. N. S. 561; *Guest v. Worcester etc. Ry Co.*, Law R. 4 Com. P. 9.

CHAPTER V.

CONDITIONAL SUBSCRIPTIONS.

- § 91 Of conditional subscriptions.
- § 92 Conditional subscriptions not necessarily conditional in form.
- § 93 Whether conditional subscriptions are contrary to public policy.
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- § 98 Taxation subject contained. —Of the burden of proof, etc.
- § 99 What is a condition.
- § 100 What conditions may be validly annexed to contracts of subscription.
- § 101 Of conditions requiring a certain amount of the capital stock to be taken.
- § 102 Of the approval of condition that the full capital stock be taken.
- § 103 As to the amount of stock, when the amount of the capital stock is to be determined by the directors.
- § 104 What a subscriber may demand although the full capital stock has not been taken.
- § 105 What subscriptions are not to be included in estimating whether a certain amount has been subscribed.
- § 106 Of conditions with respect to location of route.
- § 107 Of conditions with respect to location. A substantial compliance sufficient.
- § 108 What is a condition of performance of conditions respecting location.
- § 109 Of conditions with respect to the time of completion.
- § 110 Of conditions with respect to time. A substantial rather than a literal performance required.

§ 94 Of conditional subscriptions.—A conditional subscription to stock is defined by the leading authority upon this subject, as one of which “payment can be enforced by the corporation only after the occurrence or after the performance by the cor-

poration of certain things specified in the subscription itself." But it is submitted to the learned reader, that a condition contained in a writing separate from the subscription contract may be valid, provided it does not operate as a fraud upon the other subscribers.¹ Thus, a written agreement separate from the contract of subscription, containing a covenant to return the money received if the road were not located along a certain route, has been held enforceable.² But a condition cannot be subsequently annexed to the contract of subscription without the consent of all the parties in interest.³ If there be no evidence as to when the condition was made, it will be presumed to have been made at the time of subscribing.⁴ As a general rule a condition may be annexed to a contract of subscription, whether it be made before commissioners or be taken by agents of the company.⁵ In Pennsylvania, however, commissioners are held to have no authority to take subscriptions upon terms other than prescribed by the charter or act of incorporation, and accordingly they have no power to accept conditional subscriptions.⁷ The subscriber does not become a member of the corporation until the condition is performed.⁸ When a certain amount of stock is required by statute to be subscribed before the company shall become incorporated, conditional subscriptions cannot be reckoned. Any other rule would lead to the procurement from the commonwealth of valuable charters without any absolute capital for their support, and thus give rise to a system of speculation and fraud which would be intolerable.⁹

1 Mr. Cook in his treatise on Stock and Stockholders, § 77. For a full

and learned discussion of the subject of conditional subscriptions, see Cook on Stocks & Stockholders, ch. 5.

2 White Mountain R. R. Co. v. Eastman, 34 N. H. 134.

3 Transport etc. Turnpike Co. v. Churchill, 6 Mon. 427.

4 New Hampshire Central R. R. Co. v. Johnson, 33 N. H. 90; 633 Am. Dec. 359.

5 Johnson v. Pittsburgh etc. R. R. Co. 32 Pa. St. 334; 73 Am. Dec. 792; Woods's Railway Law § 30.

6 Martin v. Pensacola etc. R. R. Co. 8 Fla. 370; 73 Am. Dec. 713; Evansville etc. R. R. Co. v. Shennert, 1 Ind. 212; *New Albany etc. R. R. Co. v. McCracken*, 1 Ind. 499; 71 Am. Dec. 337. Cf. Pittsburgh etc. R. R. Co. v. Stewart 41 Pa. St. 54.

7 Pittsburgh etc. R. R. Co. v. Biggers, 34 Pa. St. 455; *Bahington v. Pittsburgh etc. R. R. Co.* 34 Pa. St. 13; *Bedford R. R. Co. v. Downer*, 43 Pa. St. 28. See, however, *Pittsburgh etc. R. R. Co. v. Stewart*, 41 Pa. St. 54.

8 McMillan v. Maysville etc. R. R. Co. 15 Minn. R. 218; 51 Am. Dec. 181; *Conasa v. Sycamore etc. R. R. Co.* 35 Ill. 215; *Evansville etc. R. R. Co. v. Shearer*, 1 Ind. 212.

9 Caley v. Philadelphia etc. R. R. Co. 80 Pa. St. 263.

§ 95 Conditional subscriptions not necessarily conditional in form. It is not essential to the conditional nature of the contract that it be couched in conditional language. Conditions will in certain cases be implied from recitals contained in the contract of subscription, or in the charter, or articles of association, with reference to which the parties are deemed to have formed the agreement. Thus a description of the route along which it is supposed the road will be constructed, and the mention of certain towns as the intended *termini*, raises an implied condition that the road will be so constructed to and from those places.¹ It has been held in England that where a prospectus stated the amount of the capital stock and a less amount was taken, a subscriber might claim that his subscription was conditional upon the full amount being taken.² And the same rule prevails generally with respect to recitals of the amount of the capital stock, contained in the char-

ter or in the contract of subscription.¹ But not every provision in the charter or contract of subscription is to be construed as a condition. For example, it has been decided not to be a defense to an action to enforce payment, that the road was not completed within the time mentioned in the contract of subscription, time not appearing to have been of its essence.² In such a case there might be an abatement by way of damages if injury had resulted from the delay, but not an entire release from liability.³ And the words "to be expended between" two designated points, have been held not to be a condition precedent, but a mere direction or request as to the manner in which the money subscribed should be applied.⁴

1 *Vide* § 109 *infra*, and cases there cited.

2 *Pitchford v. Davis*, 5 Mees & W. 2.

3 *Vide infra*, § 103, and cases there cited.

4 *Kansas City etc. R. R. Co. v. Alderman*, 47 Mo. 349.

5 *Kansas City etc. R. R. Co. v. Alderman*, 47 Mo. 349.

6 *Lane v. Brainerd*, 30 Conn. 585.

§ 96. **Whether conditional subscriptions are contrary to public policy.**—Generally, in the absence of some statutory prohibition, conditional subscriptions are not regarded as against public policy.¹ But in New York subscriptions taken for the purpose of obtaining incorporation are rendered void by being made conditionally;² while in Pennsylvania the subscription itself is valid and binding, but the condition null and void.³ After incorporation, however, the company may receive conditional subscriptions.⁴

1 *Ashtabula etc. R. R. Co. v. Smith*, 15 Ohio St. 323. *Cf. McMillan v. Mayville etc. R. R. Co.* 13 Mon. B. 218; 61 Am. Dec. 131; *New Albany etc. R. R. Co. v. McCormick*, 19 Ind. 439; 71 Am. Dec. 337.

3 *Troy etc. R. R. Co. v Tibbits*, 18 Barb. 297. See also *Putnam v City of New Albany*, 4 Biss. 333, 333, where the United States court would seem to follow the New York rule. See also § 103 *infra*, as to the New York rule in regard to conditions to influence location of route.

3 *Boyd v Peach Bottom R'y Co.* 91 Pa. St. 169; *Caley v Philadelphia etc. R. R. Co.* 83 Pa. St. 383; *Belford R. R. Co v Bowser*, 4 Pa. St. 28; *Barrington v Pittsburgh etc. R. R. Co.* 41 Pa. St. 357; *Pittsburgh etc. R. R. Co v Biggar*, 31 Pa. St. 435; *Pittsburg etc. R. R. Co v Woodrow*, 3 Phila. 271. *Cf Ligonier Valley R. R. Co v Williams*, 25 Leg. Intel. 42. See also *Burke v Smith*, 1 Wall. 330, where the United States court would seem to follow the Pennsylvania rule.

4 *Caley v Philadelphia etc. R. R. Co.* 83 Pa. St. 383. *Pittsburgh etc. R. R. Co. v. Stewart*, 41 Pa. St. 51; *Union Hotel Co. v Hersco*, 13 N. Y. 43; 35 Am. Rep. 536. *Cf Hanover Junction etc. R. R. Co. v Haldeman*, 22 Pa. St. 36.

§ 97. Of conditions precedent and subsequent.

A condition precedent is one which renders the subscriber's liability to take and pay for shares of stock dependent upon the performance of some specific act by the corporation.¹ A condition subsequent is one which does not affect the subscriber's liability to take and pay for his shares, but which gives him a right of action against the corporation upon its failure to perform the specified act.¹ Whether a subscription to stock be precedent or subsequent, is a question purely of intent, to be determined by considering the words both of the clause containing the condition and of the whole contract, as well as the nature of the act required and the subject-matter to which it relates.² For example, a stipulation as to the *location* of the route is a condition precedent, for the route is held to be "located" when the course has been adopted by the directors;⁴ but a requirement that the road shall be *constructed* along a certain route must be deemed a condition subsequent.⁵ For applying the condition to the subject-matter to which it relates, it is seen that to consider the latter a condition precedent imposes the unreasonable obligation upon

the company of building the road without money and delivering it a finished work to the subscribers.* Other conditions by reason of the necessities of the case must be regarded as conditions subsequent, such as that the money paid shall be expended on a particular part of the route;¹ that alterations shall be ordered only by a vote of the directors;² that commissioners should be appointed to see that other conditions are carried out.³

1 See Wood's Railway Law, § 26, and the cases cited *infra*.

2 *Belfast etc. R'y Co. v. Moore*, 60 Me. 531; *Mill Dam Foundry v. Harrey*, 39 Mass. 417, 432; and the cases cited *infra*.

3 *Bucksport etc. R. R. Co. v. Inhabitants of Bremen*, 67 Me. 295; *Chamberlain v. Painesville etc. R. R. Co.* 15 Ohio St. 225.

4 *Id.* *infra*, § 110.

5 *Miller v. Pittsburgh etc. R. R. Co.* 40 Pa. St. 237; 30 Am. Dec. 570; *Pittsburg etc. R. R. Co. v. Biggar*, 34 Pa. St. 455; *Woonsocket Union R. R. Co. v. Sherman*, 3 R. I. 564; *Swartwout v. Michigan etc. R. R. Co.* 24 Mich. 309; *Warner v. Callender*, 20 Ohio St. 180. *Cf. McMillan v. Maysville etc. R. R. Co.* 15 Mon. B. 218; 61 Am. Dec. 181; *North Missouri R. R. Co. v. Winkler*, 29 Mo. 318; *Belfast etc. R'y Co. v. Moore*, 60 Me. 551, 570; *Bucksport etc. R. R. Co. v. Inhabitants of Bremen*, 67 Me. 295; *Chamberlain v. Painesville etc. R. R. Co.* 15 Ohio St. 225.

6 *Miller v. Pittsburgh etc. R. R. Co.* 40 Pa. St. 237; 30 Am. Dec. 570.

7 *Lane v. Brainerd*, 30 Conn. 555.

8 *Bucksport etc. R. R. Co. v. Buck*, 68 Me. 81.

9 *Shaffner v. Jeffries*, 19 Mo. 512.

§ 98. Acceptance of conditional subscriptions.

Until a conditional subscription has been accepted by the corporation it remains merely a continuing offer; but when once accepted the minds of the parties have met and the contract is complete.¹ A conditional subscription being a continuing offer merely, it may be recalled if acceptance is unreasonably deferred.² Acceptance may be shown by the corporation entering the subscription upon its records,³ or it may be proven by parol.⁴ Acceptance by a president of the company, all of whose acts

are afterwards ratified by the directors, is sufficient to bind the company and the subscriber.⁵ There can be no acceptance of an escrow subscription until its final delivery to the company.⁶

1 *Taggart v. Western Maryland R. R. Co.* 24 Md. 563; 89 Am. Dec. 760; *Galt v. Swain*, 9 Gratt. 633; 50 Am. Dec. 311; *Junction R. R. Co. v. Reeve*, 15 Ind. 236; *Lowe v. Edgefield etc. R. R. Co.* 1 Head (Tenn.) 53; *Ashtabula etc. R. R. Co. v. Smith*, 15 Ohio St. 328.

2 *Taggart v. Western etc. R. R. Co.* 24 Md. 263.

3 *New Albany etc. R. R. Co. v. McCormick*, 10 Ind. 499; 71 Am. Dec. 337.

4 *Mansfield etc. R. R. Co. v. Smith*, 15 Ohio St. 328.

5 *Pittsburgh etc. R. R. Co. v. Stewart*, 41 Pa. St. 54.

6 *Cass v. Pittsburgh etc. R'y Co.* 80 Pa. St. 31.

§ 99. **Of the construction of conditional contracts of subscription.**—The same rules are generally applicable in the construction of contracts of subscription to the capital stock of a railway company as control the construction of other ordinary contracts, the aim of the court being always to discover the intent and meaning of the parties as indicated by the language employed by them, taken in connection with the circumstances attending each particular case.¹ The words employed by the parties in a conditional contract of subscription must be so construed as to carry into effect their mutual understanding. The court must ascertain what the parties understood and intended by this language, and may not deviate therefrom, whether the contract so interpreted be wise or unwise for either party.² The circumstances which existed at the time of making the contract and not those which afterwards arose, are to be considered in construing its meaning.³ Of two equally probable constructions the court will incline toward that

which favors the execution of the scheme rather than that which is unfavorable thereto.⁴ The meaning of an ambiguous contract is a question of fact for the jury.⁵

1 *Detroit etc. R. R. Co. v. Starnes*, 38 Mich. 698.

2 *Memphis etc. R. R. Co. v. Thompson*, 24 Kan. 170, 176.

3 *Detroit etc. R. R. Co. v. Starnes*, 33 Mich. 698; *Monadnock etc. R. R. Co. v. Felt*, 52 N. H. 373.

4 *Ashtabula etc. R. R. Co. v. Smith*, 15 Ohio St. 328.

5 *Connecticut R. R. Co. v. Baxter*, 32 Vt. 805. For examples of the construction of conditional contracts of subscription, see *Berryman v. Cincinnati etc. R. R. Co.*, 14 Bush, 755; *People v. Holden*, 83 Ill. 93; *Connecticut etc. R. R. Co. v. Baxter*, 32 Vt. 805; *Iowa etc. Ry Co. v. —*, 37 Iowa, 267; *Courtright v. Strickler*, 37 Iowa, 382.

§ 100. **Of the performance of conditions.**—A subscriber cannot be held liable upon a conditional subscription until the condition has been fulfilled by the corporation.¹ All of several conditions must be performed before calls can be made;² but if one part of the subscription be free from condition it may be collected independently.³ Upon the performance of the condition, the contract is clothed with a valid consideration which relates back, and the promise at once becomes obligatory.⁴ A substantial compliance is sufficient.⁵ And whether or no there be any condition with respect to time, performance must be within a reasonable time.⁶ It has been said that unforeseen difficulties from natural causes, such as floods, do not excuse a failure to perform.⁷ If, however, the subscriber himself prevent the performance of the condition, the company will be released from the obligation to perform.⁸ When the plans of the company have been so changed, after a part payment on a conditional subscription, that the

condition cannot be fulfilled, the subscriber may recover what he has paid.⁹ A condition as to the construction of a road is not violated by reason of the road being constructed by another company, it being of no importance to the subscriber by whom the work is done.¹⁰ One who has made a conditional subscription does not become a member of the corporation or a stockholder until the fulfillment thereof.¹¹

1 *Burrows v. Smith*, 10 N. Y. 530; *Montpellier etc. R. R. Co. v. Langdon*, 46 Vt. 284; *Philadelphia etc. R. R. Co. v. Hickman*, 28 Pa. St. 313; *Monadnock R. R. Co. v. Felt*, 52 N. H. 379; *Ashtabula etc. R. R. Co. v. Smith*, 15 Ohio St. 328.

2 *Porter v. Raymond*, 53 N. H. 519; *Cook on Stock & Stockh.* § 82, where the subject of performance of conditions is fully treated.

3 *St. Louis etc. R. R. Co. v. Eakins*, 30 Iowa, 279; *Cook on Stock & Stockh.* § 87.

4 *Des Moines Valley R. R. Co. v. Graff*, 27 Iowa, 99; 1 Am. Rep. 256.

5 *Springfield Street R. y Co. v. Sleeper*, 121 Mass. 29; *O'Neal v. King*, 3 Jones (N. C.) 517; *Virginia etc. R. R. Co. v. County etc.* 8 Nev. 68. *Contra, Martin v. Pensacola etc. R. R. Co.* 8 Fla. 570, 390; 73 Am. Dec. 713, where a strict compliance is said to be necessary.

6 *Stevens v. Corbitt*, 33 Mich. 458. See also §§ 112, 113, *infra*.

7 *Memphis etc. R. R. Co. v. Thompson*, 24 Kan. 170.

8 *Upton v. Hanabrough*, 3 Biss. 417, 423.

9 *Jewett v. Lawrenceburgh etc. R. R. Co.* 10 Ind. 538.

10 *Michigan etc. R. R. Co. v. Bacon*, 33 Mich. 466; *Detroit etc. R. R. Co. v. Sterne*, 33 Mich. 683.

11 *Chase v. Sycamore etc. R. R. Co.* 23 Ill. 215; *McMillan v. Mayville etc. R. R. Co.* 15 Mon. B. 218, 61 Am. Dec. 181; *Evansville etc. R. R. Co. v. Shearer*, 10 Ind. 244.

§ 101. The same subject continued.—Of the burden of proof, etc.—In an action to enforce a conditional subscription the corporation must allege performance,¹ and the burden is upon it to show that the condition has been performed.² The action, however, is not to be defeated by reason of the subscription having been made upon a condition subsequent, which had not been fulfilled when suit was commenced.³ Whether a condition has been per-

formed is a question of fact⁴ to be determined ordinarily by the jury.⁵ Performance may be proven by parol,⁶ or by the corporate records,⁷ or by a certificate of the directors; but such certificate may be impeached by evidence to the contrary.⁸ A subscriber is entitled to notice of the performance of the condition, and until notice is given a general call does not apply to conditional subscribers.⁹

¹ *Roberts v. Mobile etc. R. R. Co.* 35 Miss. 373; *Henderson etc. R. R. Co. v. Lovell*, 16 Mon. D. 358.

² *Union Hotel Co. v. Hersee*, 15 Hun, 371; *Santa Cruz R. R. Co. v. Schwartz*, 13 Cal. 106; *People v. Holden*, 52 Ill. 93; *Chase v. Sycamore etc. R. R. Co.* 39 Ill. 215; *Edgelfield etc. R. R. Co. v. Reynolds*, 48 Conn. 378; *Monadnock R. R. Co. v. Felt*, 62 N. H. 379; *Bucksport etc. R. R. Co. v. Buck*, 63 Me. 533; *Pittsburgh etc. R. R. Co. v. Hickman*, 28 Pa. St. 318.

³ *Belfast etc. R'y Co. v. Moore*, 63 Me. 561.

⁴ *Jewett v. Lawrenceburgh etc. R. R. Co.*, 10 Ind. 539.

⁵ *St. Louis etc. R. R. Co. v. Eakins*, 30 Iowa, 379. But see *Brand v. Lawrenceville Branch R. R. Co.* (1883) — Ga. —; where it was held to be for the court to decide whether a condition that a certain contract should be made, had been fulfilled by an agreement in writing which was alleged to be a compliance therewith.

⁶ *St. Louis etc. R. R. Co. v. Eakins*, 30 Iowa, 379.

⁷ *Penobscot etc. R. R. Co. v. Dunn*, 39 Me. 537. *Contra*, *Philadelphia etc. R. R. Co. v. Hickman*, 28 Pa. St. 318.

⁸ *Morris etc. Co. v. Nathan*, 2 Hall (N. Y.), 239.

⁹ *Chase v. Sycamore etc. R. R. Co.* 39 Ill. 215; *Cook on Stock, & Stockh.* § 89. *Contra*, *Spartanburg etc. R. R. Co. v. Do Graffenreid*, 12 Rich. (S. C.) 675; *Nichols v. Burlington etc. Co.* 4 Greene, 42.

§ 102. **Waiver of conditions.**—A condition may be expressly waived either in writing or by parol;¹ and many acts on the part of a subscriber are deemed to constitute a waiver by implication. For example, a subscriber will be considered to have waived a condition in his contract by acting as president of the company,² or director;³ or by acting as judge of an election held by the corporation;⁴ but acting as promoter of the scheme and being merely elected to an office in the company, does not

operate as a waiver of a condition in the subscription.⁵ Giving in payment of the subscription an absolute promissory note without mention therein of the condition,⁶ or a payment of the whole of the subscription, will operate as a waiver.⁷ But partial payments,⁸ made without knowing that the condition has not been performed, or in reliance upon false assurances of officers of the company that it has been performed, are not to be deemed a waiver of the condition.⁹ A waiver cannot be presumed from mere silence.¹⁰

1 *Hanover Junction etc. R. R. Co. v. Haldeman*, 82 Pa. St. 36; *Woonsocket Union R. R. Co. v. Sherman*, 8 R. I. 534.

2 *Dayton etc. R. R. Co. v. Hatch*, 1 Disney, 84.

3 *Lane v. Brainerd*, 30 Conn. 565.

4 *Pittsburgh etc. R. R. Co. v. Proudfit*, 2 Pittsb. (Pa.) 85.

5 *Ridgefield etc. R. R. Co. v. Reynolds*, 46 Conn. 375.

6 *O'Donald v. Evansville etc. R. R. Co.* 14 Ind. 259; *Evansville etc. R. R. Co. v. Dunn*, 17 Ind. 607; *Chamberlain v. Painesville etc. R. R. Co.* 15 Ohio St. 225. Unless the note were procured by fraudulent misrepresentations: *Taylor v. Fletcher*, 15 Ind. 80; *Parker v. Thomas*, 19 Ind. 213; 81 Am. Dec. 285.

7 *Tarks v. Evansville etc. R. R. Co.* 23 Ind. 567.

8 *Jewett v. Lawrenceburg etc. R. R. Co.* 10 Ind. 539; *Pittsburgh etc. R. R. Co. v. Stewart*, 41 Pa. St. 54.

9 *Morris etc. Co. v. Nathan*, 2 Hall (N. Y.) 239; *Somerset etc. R. R. Co. v. Cushing*, 45 Me. 521; *Oldtown etc. R. R. Co. v. Veazie*, 39 Me. 571; *Ridgefield etc. R. R. Co. v. Brush*, 43 Conn. 86.

10 *Bucksport etc. R. R. Co. v. Inhabitants of Bremen*, 67 Me. 235; *Burlington etc. R. R. Co. v. Boestler*, 15 Iowa, 555.

§ 103. What conditions may be validly annexed to contracts of subscription.—Ordinarily anything which may be legally done by the corporation may be made a condition to a subscription for stock.¹ Thus, a subscriber may stipulate and the corporation agree, that certain things shall be done within a specified time;² that the road shall be constructed along a certain route;³ that the money paid on the subscription shall be expended on a

particular part of the work;⁴ that payment shall be made in labor or materials;⁵ that calls shall not be made until a certain amount has been subscribed,⁶ notwithstanding that the charter may allow operations to commence when a less sum has been subscribed.⁷ But conditions inconsistent with the charter are void.⁸ So also conditions by which the subscriber seeks to evade the obligations which the law imposes upon him are of none effect.⁹ Thus the word "non-assessable" upon a certificate of stock do not relieve the shareholder accepting it from liability to pay the amount due thereon. The only effect of the words is to exempt the holder from assessment beyond the face value when the latter has been paid in full.¹⁰ If a person write his name on a blank sheet of paper on condition that it shall not be attached to the articles of association until seen and approved by him, and the paper is attached without his consent, he will not be bound thereby.¹¹

1 *Penobscot etc. R. R. Co. v. Dunn*, 39 Me. 537.

2 *Ticonde etc. Co. v. Lang*, 63 Me. 480.

3 See cases cited *infra*, § 109, *pro* and *con*.

4 *Hanover Junction etc. R. R. Co. v. Haldeman*, 82 Pa. St. 36; *Milwaukee etc. R. R. Co. v. Field*, 12 Wis. 340.

5 See cases cited *supra*, § 89.

6 *Union Hotel Co. v. Hersee*, 79 N. Y. 454; 35 Am. Rep. 636; *Penobscot etc. R. R. Co. v. Dunn*, 39 Me. 537; *Ridgefield etc. R. R. Co. v. Brush*, 43 Conn. 8; *Hanover Junction etc. R. R. Co. v. Haldeman*, 82 Pa. St. 36; *Philadelphia etc. R. R. Co. v. Hickman*, 23 Pa. St. 318.

7 *Union Hotel Co. v. Hersee*, 79 N. Y. 454; 35 Am. Rep. 639.

8 *Thigpen v. Mississippi etc. R. R. Co.* 32 Miss. 347.

9 *Vide supra*, § 83.

10 *Taylor on Corporations* (2nd ed. 1883), § 522, citing *Upton v. Tribblecock*, 91 U. S. 45, and *Hall v. Selma etc. R. R. Co.* 6 Ala. 741.

11 *Boecher v. Dittsburg etc. R. R. Co.* 76 Pa. St. 306. *Acc. Ottawa etc. R. R. Co. v. Hall*, 1 Ill. App. 612.

§ 104. **Of conditions requiring a certain amount of the capital stock to be taken.**—A contract of subscription which stipulates that a certain amount of the capital stock of the corporation shall be subscribed for before the contract can be enforced, is a conditional subscription imposing no liability upon the subscriber until the full amount therein specified has been subscribed.¹ If the company was incorporated with a smaller capital stock than was proposed at the time of making a subscription, the contract cannot be enforced.² A subsequent reduction of the capital stock by the legislature to the amount actually subscribed cannot relieve prior subscriptions from the implied condition that the full amount originally fixed be taken.³ And where it was agreed that a subscription should be paid only when the amount subscribed reached a designated sum, or a sum deemed sufficient, in the discretion of the president and directors, to accomplish a certain portion of the construction, and these officers by formal resolution fixed upon the designated sum as the amount necessary to justify them in calling upon the subscribers, they were held to have no power to change the amount, and to be obliged to procure unconditional subscriptions therefor.⁴

1 *Bucksport etc. R. R. Co. v. Buck*, 65 Me. 533; *Iowa etc. R. R. Co. v. Perkins*, 28 Iowa, 281. A subscription to a ferry company conditioned upon sufficient subscriptions for the corporate purposes being secured, has been held not enforceable until funds for the land, structures and boats had been secured: *People's Ferry Co. v. Dalch*, 74 Mass. 263.

2 *Santa Cruz R. R. Co. v. Shurtz*, 53 Cal. 106. But see *Oregon Central R. R. Co. v. Ecoggin*, 3 Or. 11; *Cheraw etc. R. R. Co. v. White*, 10 S. C. 155; *York etc. R. R. Co. v. Pratt*, 49 Me. 447; *Elowhegan etc. R. R. Co. v. Kinsman*, 77 Me. 370. *Cf.* *Chubb v. Upton*, 55 U. S. 665, 668.

3 *Oldtown etc. R. R. Co. v. Veazie*, 33 Me. 571.

4 *Brand v. Lawrenceville Branch R. R. Co.* (1888) — Ga. —

§ 105. Of the implied condition that the full capital stock be taken.—When the amount of the capital stock is stated in the contract of subscription,¹ or in a prospectus,² or in the charter or articles of association, every subscription is made upon the implied condition that the designated amount shall be subscribed;³ and if the amount therein named had not been subscribed before the company began active operations, a subscriber cannot be held to his contract;⁴ except where it is obvious from the face of the charter that the whole capital stock is not requisite to the organization of the company, and where the subscriber had reason to know this at the time of subscribing,⁵ “and unless a contrary intention appears, expressly or by implication, either in the charter or the contract of subscription.”⁶ “This is no arbitrary rule. It is founded on a plain dictate of justice, and the strict principles regulating the obligation of contracts,”⁷ viz., upon the ground that the proportional risk of the subscriber in the enterprise is not to be varied without his consent. The amount fixed as the capital stock is treated as essential to the success of the scheme, and the subscribers are not to be held liable until, by raising the full amount, success is ensured.⁸ In seeking to enforce a contract of subscription, the corporation must aver that the full capital stock has been subscribed.⁹

¹ *Erie etc. R. R. Co. v. Owen*, 32 Barb. 516; *Boston etc. R. R. Co. v. Wellington*, 113 Mass. 78; *Salem Mill Dam Co. v. Lopes*, 6 Pick. 23; *Practical etc. R. R. Co. v. Dummer*, 43 Me. 172; 63 Am. Dec. 634; *Penobscot etc. R. R. Co. v. Bartlett*, 12 Gray, 244; 71 Am. Dec. 753; *Waterford etc. Ry. Co. v. Dalbosc*, 6 Ex. 443. See, however, *Barnes etc. Plank R. Co. v. Wetzel*, 21 Barb. 56.

² *Pitchford v. Davis*, 5 Meen. & W. 1.

³ *Bray v. Farwell*, 81 N. Y. 600, 605; *Memphis Branch R. R. Co. v. Sullivan*, 37 Ga. 240; *Selma etc. R. R. Co. v. Anderson*, 51 Miss. 639; *New*

York etc. R. R. Co. v. Hunt, 39 Conn. 75, Livesey v. Omaha Hotel, 81
50, Shurtz v. Schoolcraft etc. R. R. Co. 9 Mich. 269; Tempie v. Lamson,
Ill. 51, Adman v. Havana R. R. Co. 88 Ill. 521, Salem Mill Dam Cor-
poration v. Rogers, 6 Pick. 23; S. C. 9 Pick. 187, Contonco & Vanev R. R.
v. Barker 32 N. H. 363, Warwick R. R. Co. v. Cady 11 R. I. 131, Bell
etc. R. R. Co. v. Cuttrell, 66 Me. 185; Lewey v. Island R. R. Co. v. Bell,
48 Me. 451 77 Am. Dec. 236, Peoria etc. R. R. Co. v. Preston 35 Iowa,
Littleton Manuf. Co. v. Parker, 14 N. L. 543, Cook on Stock & Bonds
§ 176. Cf. Monroe v. Fort Wayne etc. R. R. Co. 28 Mich. 272, Hale v. B.
Corn, 18 Neb. 1. Contra, Nelson v. Blakey, 54 Ind. 29.

4 Haskel v. Worthington (1888), 94 Mo. 560, and cases cited *supra*.

5 Taylor on Corporations (2nd ed. 1888), § 518 citing Musgrave
Morrison, 54 M. 101.

6 Peoria etc. R. R. Co. v. Preston, 35 Iowa, 118.

7 Stoneham Branch R. R. Co. v. Gould, 68 Mass. 277.

8 Woods Railway Law, § 29.

9 Harb v. North Western etc. R. R. Co. 41 Ind. 196. *Fry v. Lexington
etc. R. R. Co.* 2 Met. Ky. 511. *Contra*, Lewey v. Island R. R. Co. v. Bell,
48 Me. 451, 77 Am. Dec. 236. *Bank v. Mt. Sterling etc. R. R. Co.* 13 Ensh.
It is said, however, by a learned authority, that unless the charter of a com-
pany, or the subscription itself, makes such a condition, it is not binding
from the language thereof. *Woods Railway Law* § 29, cited *generally* in
Kennebec etc. R. R. Co. v. Jarvis, 31 Me. 360, *York etc. R. R. Co. v. Preston*,
Me. 447, *Waterford etc. Ry. Co. v. Dalbiac*, 6 Ex. 443, *Lexington etc. R. R.
Co. v. Chandler* 13 Met. 511, *Peoria etc. R. R. Co. v. Preston*, 35 Iowa, 118,
524, *Nutter v. Lexington etc. R. R. Co.* 6 Gray, 85, *Boston etc. R. R. Co.
v. Worthington*, 113 Mass. 79, *Aronwick R. R. Co. v. Cady*, 11 R. I. 131,
Hogland v. Cornstie etc. R. R. Co. 18 Ind. 432, *Henderson etc. R. R.
Road Co. v. Rice*, 7 Barb. 157. See also, *in re Jennings*, 1 Br. Ch.
Waterford etc. Co. v. Dalbiac, 20 Law J. Ex. 227, *Stratford etc. Co. v. Ed-
ton*, 2 Barn. & Ad. 518.

§ 106. As to the implied condition where the amount of the capital stock is to be determined by the directors.—In those cases in which the charter has left the amount of the capital stock to be fixed by the corporate authorities, it is a general rule that no subscriber is bound until the amount has been determined and the whole subscribed. There are, however, authorities which hold that the subscriber is liable, although the amount of capital has not been settled,² and although the subscriptions fall below the minimum number of shares specified in the charter.³ When the charter prescribes maximum and minimum limits between which the directors are to fix the capital stock, and

provides also that assessments be made when the minimum has been subscribed, when that amount has been taken the subscribers are bound to pay the assessments, although the directors have not determined upon the amount of the full capital stock.⁴ But ordinarily the minimum having been subscribed is not sufficient to render the subscribers liable unless that amount has been fixed as the capital.⁵

1 *Troy etc. R. R. Co. v. Newton*, 74 Mass. 597; *Worcester etc. R. R. Co. v. Hinds*, 62 Mass. 110; *Pike v. Shore Line*, 63 Me. 445; *Somerset R. R. Co. v. Clarke*, 61 Me. 324.

2 *Kirksey v. Florida etc. R. R. Co.* 7 Fla. 23; 77 Am. Dec. 422; *City Hotel v. Dickinson*, 72 Mass. 586; *Warwick etc. R. Co. v. Cady*, 11 R. I. 131; *Ward v. Criswellville Manuf. Co.* 18 Conn. 593. See *White Mountains R. R. Co. v. Eastman*, 31 N. H. 121, where the charter allowed assessments when the lower of two limits had been subscribed.

3 *Showhegan etc. R. R. Co. v. Kinman*, 77 Me. 370.

4 *White Mountain R. R. Co. v. Eastman*, 31 N. H. 124; *Penobscot R. R. Co. v. Bartlett*, 12 Gray, 244; 71 Am. Dec. 753; *Wood's Railway Law*, § 29.

5 *Pike v. Shore Line*, 63 Me. 445. As to what acts of the corporate authorities are equivalent to an express resolution fixing the amount of capital, see *Bucksport etc. R. R. Co. v. Luck*, 13 Me. 150, a resolution to limit the time of subscription and then closing the books; *Lexington etc. R. R. Co. v. Chandler*, 51 Mass. 311, a resolution to close the books at a certain time; *Penobscot etc. R. R. Co. v. Bartlett*, 78 Mass. 244; 71 Am. Dec. 753.

§ 107. When the subscriber may be liable although the full capital stock is not taken.—If, however, the act of incorporation authorizes the organization of the corporation and the commencement of operations upon less than the full capital stock being subscribed, it will not be necessary to the validity of the subscriptions that the full amount be taken.¹ Nor is it necessary, where the agreement is to pay "when required."² And it is no defense to an action on unpaid subscriptions for stock, bought in the interest of the corporate creditors, that all of the authorized capital stock may not have

been taken, the answer admitting the subscription to the stock, but alleging a subsequent surrender thereof, and a discharge from the obligation to pay therefor.¹ The fact that the amount of the capital stock provided for by a subsequently adopted charter has not all been taken, does not relieve a subscriber from taking the stock for which he had subscribed prior to the adoption of the charter.²

1 *Schenectady etc. Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Renmelaer etc. Plank Road Co. v. Wetzel*, 21 Barb. 52; *Hoagland v. Cincinnati etc. R. R. Co.*, 18 Ind. 452; *Hunt v. Kansas etc. Co.*, 11 Kansas, 42; *Sedam etc. R'y Co. v. Abell*, 17 Mo. App. 645; *Boston etc. R. R. Co. v. Wellington*, 113 Mass. 79; *Lexington etc. R. R. Co. v. Chandler*, 54 Mass. 311; *Prohaska etc. R. R. Co. v. Bartlett*, 12 Gray, 244, 71 Am. Dec. 753; *Hanover etc. R. R. Co. v. Holdeman*, 82 Pa. St. 30; *Illinois River R. R. Co. v. Zimmer*, 20 Ill. 654; *Jewett v. Valley R'y Co.*, 34 Ohio St. 601. *Contra*, *Galveston Hotel Co. v. Balton*, 46 Tex. 633. *Cf.* *Kennebec etc. R. R. Co. v. Jarvis*, 34 Me. 360.

2 *Cheraw etc. R. R. Co. v. Garland*, 14 S. C. 63.

3 *Farnsworth v. Robbins*, 36 Minn. 339.

4 *Belton Compress Co. v. Sanders* (1888), 70 Tex. 699.

§ 108. What subscriptions are not to be included in estimating whether a certain amount has been subscribed. —In determining whether the full capital stock, or a certain amount thereof, has been subscribed, conditional subscriptions are not to be included,¹ unless it be shown that the conditions have been performed or have been waived.² Nor, it is generally held, are those subscriptions which are yet to be paid for in labor and materials, to be included,³ nor subscriptions made by contractors upon special terms;⁴ nor subscriptions payable in a depreciated currency;⁵ nor colorable or fictitious subscriptions.⁶ Nor are subscriptions of infants and married women to be included unless already paid for;⁷ nor the subscriptions of insolvent persons, unless already paid in, or unless they

were apparently solvent at the time of subscribing.² But the insolvency of other subscribers cannot be plead as a defense, unless it be shown that the corporation acted in bad faith in receiving them.³

1 *Boston etc. R. R. Co. v. Wellington*, 113 Mass. 79; *Troy etc. R. R. Co. v. Newton*, 74 Mass. 588. Cf. *Osley v. Philadelphia etc. R. R. Co.* 88 Pa. 84, 263; *Brand v. Lawrenceville Branch R. R. Co.* (1888). — Ga. —

2 *Boston etc. R. R. Co. v. Wellington*, 113 Mass. 79; *Troy etc. R. R. Co. v. Newton*, 74 Mass. 588.

3 *Troy etc. R. R. Co. v. Newton*, 74 Mass. 588; *Oldtown etc. R. R. Co. v. Venzle*, 39 Me. 51; *New York etc. R. R. Co. v. Hunt*, 39 Conn. 78; *Edgenfield etc. R. R. Co. v. Brush*, 43 Conn. 84, is not contra, as the agreement there to pay in work was parol and could not be allowed to vary an apparently absolute written contract of subscription. *Contra, Phillips v. Covington etc. Co.* 2 Met. (Ky.) 219.

4 *Boston etc. R. R. Co. v. Wellington*, 113 Mass. 79; *Oskaloosa etc. Works v. Parkhurst*, 54 Iowa, 357.

5 *Cabot etc. Bridge v. Chapin*, 4 Cmh. 59.

6 *Memphis Branch R. R. Co. v. Sullivan*, 57 Ga. 248.

7 *Phillips v. Covington etc. Co.* 2 Met. (Ky.) 219.

8 *Phillips v. Covington etc. Co.* 2 Met. (Ky.) 219; *Belfast etc. R'y Co. v. Inhabitants of Bryans*, 60 Me. 565. *Lynch v. City of B. R. Co.* 48 Me. 451. 57 Am. Dec. 236. *Salem Mill Dam Corporation v. Rogers* 26 Mass. 187. As to whether a conditional subscription may be rescinded on the ground that the subscriptions of insolvents have been counted in estimating the fund for the subscription, see *Me. v. B. R. Co.* 48 Me. 451; *B. R. Co. v. Sullivan*, 57 Ga. 248; *Pry v. Lexington etc. R. R. Co.* 2 Met. (Ky.) 314; *Dall v. Mt. Sterling and Richmond R. R. Co.* 13 Bush, 3; *Belleville R. Co. v. Clarke*, 4 Me. 37; *Old White R. R. Co. v. Venzle*, 39 Me. 51; *Cantabrook etc. R. R. Co. v. Barker*, 32 N. H. 336; *New Hampshire Central R. R. Co. v. Johnson*, 3 N. H. 390, 64 Am. Dec. 300; *Pearla etc. R. R. Co. v. Preston*, 35 Iowa, 115.

9 *Wood's Railway Law*, § 20.

§ 109. Of conditions with respect to location of route.—In most of the States, conditions with respect to the location of the route of the railway may be validly annexed to the contract of subscription, and payment cannot be enforced if the condition has been violated.¹ And it may be validly stipulated that the location shall be subject to the subscriber's approval.² But in New York, with respect to ordinary roads, where the general turnpike act did not authorize the commissioners

to accept conditional subscriptions, it has been held that a subscription conditioned upon a certain location of the road was void as against public policy.³ This rule, however, does not seem to have been generally applied to the location of railways.⁴ If the contract of subscription itself, or the charter (with reference to which the parties are presumed to contract), describes the route of the road and mentions the *termini* thereof, although the language be not conditional, it will be construed as an implied condition that the road should be so built, and any material alteration of route, or a change of the *termini*, will release the subscriber from payment.⁵ If a different route be adopted before the payment of the subscription, the subscriber would probably be released, but if after, the only remedy is by injunction.⁶ But laches will bar the remedy by injunction to restrain a change of route.⁷ Where there is no express condition with respect to location of the road, and the charter confers upon the company the authority to change its location, a subscriber cannot be released from his contract, because the private advantage which would have accrued to him from the proximity of the line to his property has been lost by the change.⁸

1. *Roberts v. Mobile etc. R. R. Co.* 32 Miss. 373; *Martin v. Pensacola etc. R. R. Co.* 8 Fla. 370; 43 Am. Dec. 713; *Nashville etc. R. Co. v. Baker*, 2 Cond. 574; *M. Millan v. Magn. etc. R. R. Co.* 15 Mon. B. 218, 61 Am. Dec. 181; *Henderson etc. R. R. Co. v. Leavell*, 18 Mon. B. 358; *Charlotte etc. R. R. Co. v. Blakey* 3 Stroh. 245; *Spartanburgh etc. R. R. Co. v. Graffeuord*, 12 Rich. 275; *Taggart v. Western Maryland R. R. Co.* 24 Md. 563, 83 Am. Dec. 760; *Taylor v. Fletcher*, 15 Md. 85; *Missouri Pacific Ry. Co. v. Taggart*, 81 Mo. 24 54 Am. Rep. 97; *Connecticut etc. R. R. Co. v. Birler*, 32 Va. 305; *Fisher v. Evans etc. R. R. Co.* 7 Ind. 407; *Agricultural etc. R. R. Co. v. Winchester*, 13 Allen. 21; *Coley v. Philadelphia etc. R. R. Co.* 80 Pa. St. 363; *Moore v. Hanover Junction R. R. Co.* 94 Pa. St. 324; *Miller v. Pittsburgh etc. R. R. Co.* 41 Pa. St. 237, 85 Am. Dec. 573; *Cumberland Valley R. R. Co. v. Baab*, 9 Watts, 458, 35 Am. Dec. 132; *Paris etc. R. R. Co. v. Henderson*, 23 Ill. 86; *Wear v. Jacksonville etc. R. R. Co.* 24 Ill. 596; *Bucksport etc. R. R. Co. v.*

Brewer, 67 Me. 225; *Jewett v. Lawrenceburgh etc. R. R. Co.* 10 Ind. 539; *Evansville etc. R. R. Co. v. Sharer*, 10 Ind. 246; *Detroit etc. R. R. Co. v. Starnes*, 38 Mich. 638; *Swartout v. Michigan etc. R. R. Co.* 21 Mich. 383; *Chamberlain v. Painesville etc. R. R. Co.* 15 Ohio St. 225; *Mansfield etc. R. R. Co. v. Brown*, 23 Ohio St. 223; *Cooper v. McKee*, 53 Iowa, 239; *Des Moines Valley R. R. Co. v. Graff*, 27 Iowa, 99; 1 Am. Rep. 256; *Burlington etc. R. R. Co. v. Boestler*, 15 Iowa, 535; *Woonsocket etc. R. R. Co. v. Suerman*, 8 R. I. 564; *West Cornwall etc. R'y Co. v. Mowatt*, 15 Q. B. 521.

2 *Spartanburgh etc. R. R. Co. v. Graffenried*, 12 Rich. (S. C.) 675; 73 Am. Dec. 476; *North etc. R. R. Co. v. Winkler*, 29 Mo. 318; *Mansfield etc. R. R. Co. v. Stout*, 26 Ohio St. 241; *Mansfield etc. R. R. Co. v. Brown*, 23 Ohio St. 224; *Chamberlain v. Painesville etc. R. R. Co.* 15 Ohio St. 225; *Des Moines etc. R. R. Co. v. Graff*, 27 Iowa, 99; 1 Am. Rep. 256; *Robert's Case*, 3 De Gex & S. 235; S. C. 2 Macn. & G. 196.

3 *Fort Edward etc. Plank Road Co. v. Payne*, 15 N. Y. 583; *Butternut etc. Turnpike Co. v. North*, 1 Hill, 518; *Macedon etc. Plank Road Co. v. Snediker*, 13 Barb. 317.

4 *Lake Ontario etc. R. R. Co. v. Curtiss*, 80 N. Y. 219; *Cayuga Lake R. R. Co. v. Kyle*, 5 Thomp. & C. 659; *Buffalo etc. R. R. Co. v. Pott's*, 23 Barb. 21. *Contra*, *Utica etc. R. R. Co. v. Brinckerhoff*, 21 Wend. 130; 34 Am. Dec. 220.

5 *Burrows v. Smith*, 10 N. Y. 550; *Csley v. Philadelphia etc. R. R. Co.* 80 Pa. St. 333; *Burlington etc. R. R. Co. v. Whitney*, 43 Iowa, 113; *Luckfield etc. R. R. Co. v. Irish*, 39 Me. 44; *Oldtown etc. R. R. Co. v. Vcazie*, 39 Me. 579; *Danbury etc. R. R. Co. v. Wilson*, 22 Conn. 435. But see *Jewett v. Valley R. R. Co.* 34 Ohio St. 601; *Greenville etc. R. R. Co. v. Johnson*, 8 Baxt. (Tenn.) 332; *Whitehall etc. R. R. Co. v. Myers*, 16 Abb. Pr. N. S. 34.

6 *Henderson etc. R. R. Co. v. Leavell*, 16 Mon. B. 358.

7 *Chapman v. Mad River etc. R. R. Co.* 6 Ohio St. 119.

8 *Fry v. Lexington etc. R. R. Co.* 2 Met. (Ky.) 314; *Delaware R. R. Co. v. Thorp*, 1 Houst. 149; *Bauct v. Alton etc. R. R. Co.* 13 Ill. 504.

§ 110. Of conditions with respect to location—
A substantial compliance sufficient.—If the road be located substantially in compliance with the route described, slight departures therefrom will not be deemed in violation of the condition of the contract.¹ What constitutes a material alteration of location is to be determined by the circumstances of each case. A very slight alteration in the location of the line may, by reason of peculiar circumstances, constitute such a material alteration as will release a subscriber especially affected thereby. Thus, where the change caused the road to pass seven hundred feet further from the subscriber's

mill than the location proposed when he subscribed, he could not be held liable on his subscription;² and a condition that the road should be built on the east line of the subscriber's land has been held not fulfilled by building the track, to use the words of the complaint, "upon or as near as practicable upon, the east line of the lands owned by said defendant, and at all points within fifty feet of said east line."³ So, building a road to within three and a half miles of one of the *termini* named in the articles of incorporation, and from that point using the track of another road, has been held a failure to comply with the condition of the contract.⁴ On the other hand, where a road was built to a point within a mile of the designated town, and by using the track of another company supplied all the demands of the public, it was held to be a sufficient compliance with the condition.⁵ The location of a depot just beyond the limits of a town is not a sufficient compliance with a condition that it be located "within the limits."⁶ In determining whether a depot has been located within a certain distance from a town, measurement is to be made from the corporate limits of the town, not from the borders of that locality which by reason of its buildings and improvements is spoken of as the town.⁷ If the depot building itself be within the prescribed distance it is sufficient, although the switches and side tracks be beyond.⁸ In a condition with respect to the location of a depot the words "as near as practicable" have been construed to mean as near as could be done at a reasonable and proper expense, with reference to all the circumstances of the case and with regard to the objects

and purposes inducing the subscription, and not "as near as possible."⁹

- 1 Cayuga Lake R. R. Co. v. Kyle, 5 Thomp. & C. 569.
- 2 Moore v. Hanover Junction R. R. Co. 94 Pa. St. 324.
- 3 Crane v. Indiana etc. R'y Co. 59 Ind. 165.
- 4 Cooper v. McKee, 53 Iowa, 239. See also Lawrence v. Smith, 57 Iowa, 701.
- 5 People v. Holden, 82 Ill. 93.
- 6 Davenport etc. R. R. Co. v. O'Connor, 40 Iowa, 477.
- 7 Courtright v. Strickler, 37 Iowa, 382.
- 8 Courtright v. Strickler, 37 Iowa, 382.
- 9 Wooters v. International etc. R. R. Co. 54 Tex. 294.

§ 111. What constitutes a performance of conditions respecting location.—A condition as to location is fulfilled when the route is fixed in accordance with the contract, and the subscription thereupon becomes absolute, although the road has not been built.¹ The "permanent location" of the road is held to be the adoption of the route by the directors.² Conditions that the road shall "pass through" a certain county,³ or if the road "shall be built" through a certain place, are construed to refer to the location of the route and not to the completion of construction.⁴ Even the words "locate and construct" do not render construction a condition precedent, the location having been fixed in accordance with the condition.⁵

1 McMillan v. Maysville etc. R. R. Co. 15 Mon. B. 218; 61 Am. Dec. 181; O'Neal v. King, 3 Jones (N. C.), 517; North Missouri etc. R. R. Co. v. Winkler, 29 Mo. 218; *Miller v. Pittsburgh etc. R. R. Co.* 40 Pa. St. 237; 80 Am. Dec. 570; Parker v. Thomas, 23 Ind. 277; Branham v. Record, 42 Ind. 181; Woonsocket etc. R. R. Co. v. Sherman, 8 R. I. 54; Chamberlain v. Painesville etc. R. R. Co. 15 Ohio St. 225; Warner v. Callendar, 15 Ohio St. 190.

2 Smith v. Allison, 23 Ind. 366.

3 North Missouri R. R. Co. v. Winkler, 29 Mo. 318; Chamberlain v. Painesville etc. R. R. Co. 15 Ohio St. 225; Ashtabula etc. R. R. Co. v. Smith, 15 Ohio St. 328. Cf. *Pittsburgh etc. R. R. Co. v. Biggar*, 34 Pa. St. 455, where the words were, "provided the road goes within half a mile of Florence."

4 *Woonsocket Union R. R. Co. v. Sherman*, 8 R. I. 564; *Swartwout v. Michigan etc. R. R. Co.* 24 Mich. 329; *Warner v. Callender*, 20 Ohio St. 190.

5 *Miller v. Pittsburgh etc. R. R. Co.* 40 Pa. St. 237; 85 Am. Dec. 570. See also *McMillan v. Maysville etc. R. R. Co.* 15 Mon. B. 213; 61 Am. Dec. 131.

§ 112. **Of conditions with respect to the time of completion.**—A subscription may be made conditional upon the completion of a road within a certain time, and a substantial compliance therewith must be shown before payment can be enforced.¹ When the condition relates to the time within which work of construction is to be begun or finished, upon failure to comply therewith the contract ceases to bind the subscriber by its own limitation.² A subscription payable when the road is completed, is due when it is put in condition for regular business.³ Whether a road has been "completed" is a question of fact for the jury.⁴ A certificate of the directors that a condition has been performed within a certain time may be impeached by evidence to the contrary.⁵ A contract of subscription conditioned upon the construction of the road and the running of trains within two years, signed by the subscriber only, is not within the statute of frauds, the thing to be done being capable of performance within one year; and after performance by the company, the subscriber cannot defend on the ground that he alone had signed the instrument.⁶

1 *Chartiers R. R. Co. v. Hodgson*, 85 Pa. St. 501; *Chicago, D. & M. R. R. Co. v. Schreibe*, 43 Iowa, 79.

2 *Ticonic etc. Co. v. Lang*, 63 Me. 480; *Portland etc. R. R. Co. v. Inhabitants of Hartford*, 13 Me. 23; *Memphis etc. R. R. Co. v. Thompson*, 21 La. 173; *Durington etc. R. R. Co. v. Boettler*, 15 Iowa, 556.

3 *Tower v. Detroit etc. R. R. Co.* 31 Mich. 323.

4 *Toledo etc. R. R. Co. v. Johnson*, 49 Mich. 142.

5 *Morris etc. Co. v. Nathan*, 3 Hall (N. Y.), 239.

6 *Strangham v. Indianapolis etc. R. R. Co.* 36 Ind. 195.

§ 113. *Of conditions with respect to time—*
A substantial rather than a literal performance required.—When a time is prescribed in the charter or contract, if the enterprise be not inaugurated in good faith within that time, the subscribers are released.¹ But the company will neither be held strictly to the day,² nor yet will a mere literal compliance be always sufficient.³ A failure to complete the road until over two months after the stipulated time, has been held not necessary to defeat a recovery upon a conditional subscription.⁴ Where, however, the grading of the road-bed had been completed within the time prescribed, the final completion of the road within a reasonable time thereafter has been held a substantial compliance with the condition.⁵ A condition that the road should be built and trains running within a certain time was not considered to have been sufficiently complied with by showing that within the time prescribed an engine with tender and one passenger car, or a few flat cars, had been run over the road, the track being at places insecurely laid, and regular trains not being run until several months later.⁶ But such a condition, substantially fulfilled in other respects, was not deemed to have been broken by the fact that no depot was established and no station agent appointed at the designated point within the time specified.⁷

1 *McCully v. Pittsburgh etc. R. R. Co.* 22 Pa. St. 25.

- 2 Des Moines Valley etc. R. R. Co. v. Graff, 27 Iowa, 99; 1 Am. Rep. 256; Missouri Pacific R'y Co. v. Taggard, 84 Mo. 264.
- 3 Paris etc. R. R. Co. v. Henderson, 89 Ill. 86.
- 4 Des Moines Valley R. R. Co. v. Graff, 27 Iowa, 99; 1 Am. Rep. 256.
- 5 Missouri Pacific R'y Co. v. Taggard, 84 Mo. 264; 54 Am. Rep. 97.
- 6 Paris etc. R. R. Co. v. Henderson, 89 Ill. 86.
- 7 Ogden v. Kirby, 79 Ill. 555.

CHAPTER VI.

OF CANCELLATION AND RESCISSION OF CONTRACTS OF
SUBSCRIPTION.AND HEREIN OF PAROL AGREEMENTS AND FRAUDULENT
MISREPRESENTATIONS.

- § 114. Introductory.
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- § 116. Cancellation—Of the consent of the corporate creditors.
- § 117. The directors have no authority to cancel.
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- § 123. Illegal and wrongful acts of the corporate managers.
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- § 125. The release of other subscribers not a valid defense.
- § 126. Failure to make cash deposit required by statute—The general rule.
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- § 128. Parol agreements and conditions.
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- § 132. Of the authority of the agent making the misrepresentation.
- § 133. Of misrepresentations contained in prospectuses and reports.
- § 134. Fraud by suppression of truth and by statement of what is not known to be true.
- § 135. Of misrepresentation with respect to matters equally known to the subscriber and corporate agent.
- § 136. Of statements of opinion.

- § 137. Of misrepresentation with respect to matters of law.
- § 138. The misrepresentation must be shown to be material.
- § 139. Set-off and counterclaim in actions to enforce subscriptions.
- § 140. Abandonment, delay and failure of the corporate enterprise.
- § 141. The statute of limitations.
- § 142. Miscellaneous defenses to actions to enforce subscriptions.
- § 143. Waiver, acquiescence and delay, a bar to the subscriber's remedy.
- § 144. Corporate insolvency a bar to every remedy.

§ 114. **Introductory.**—It is a notorious fact that the original subscribers to the capital stock of railway corporations seldom derive from the undertaking that pecuniary profit which constituted the motive inducing them to enter into the contract of subscription.¹ Many are the devices, therefore, by which the subscriber has sought to rescind the contract and to escape the liabilities thereby incurred; but the courts have seldom viewed these efforts with favor, except such as were based upon the failure of the company to comply with some condition expressly stipulated in the contract or annexed thereto by implication of law,² or upon the ground of mistake as to the nature of the contract,³ or upon clear evidence of fraud.⁴ When the subscriber seeks to set aside the contract or to evade the liabilities which he has incurred, he may in a proper case, without legal proceedings, by notification to the corporate authorities and the consent of all the parties in interest, effect a cancellation of the contract,⁵ or a compromise with the directors of the company.⁶ Or the subscriber may wait until an action at law has been brought against him by the corporation to enforce payment of his subscription, and then set up by way of defense any valid cause for the illegality of the contract; or he may file his

bill in equity to restrain such suit at law and to set aside the contract and to recover back-payments; or where his defense is founded upon fraud, he has also his action for damages against the parties making the misrepresentations;¹ or upon the discovery of the fraud, he may recover money paid by him on his subscription in an action for money had and received.²

1 "The average return of the railroads in this country is under four per cent., the bondholders receiving an average of four and a half per cent., the stockholders of two and a half per cent." Hadley's Railroad Transportation, p. 101. "Within the past twelve years, no less than three hundred and ninety-two railways, representing nearly forty thousand miles of road and having a capital stock and bonded indebtedness of more than twenty-three hundred and ten millions of dollars, have been sold in the United States in foreclosure proceedings". Beach on Railroads, (October, 1887), preface.

2 *Supra*, §§ 94-113, and *infra*, §§ 120-122.

3 *Infra*, § 118.

4 *Infra*, §§ 130-132.

5 *Infra*, §§ 116-117.

6 *Infra*, §§ 118, 119.

7 *Paddock v. Fletcher*, 43 Vt. 389.

8 *Atkinson v. Pocock*, 12 Jur. 60; *Wootner v. Sharp*, 4 Com. B. 404; *Jarrett v. Kennedy*, 6 Com. B. 319. These various proceedings are fully treated in Cook on Stock & Stockh. §§ 152-159.

§ 115. Cancellation.—Of the consent of the subscriber and of the corporation.—A contract of subscription, like other contracts, may be canceled by the consent of all the parties in interest. These parties are the subscriber on the one hand, and on the other the corporation and those persons to whom it is indebted at the time of the cancellation.¹ The subscriber's consent to a cancellation may be shown by his failure to pay or to exercise the rights of a shareholder; and in such a case his subscription may be treated by the corporation as abandoned.² The consent of the corporation can be given only by the shareholders—either expressly, by an *unani-*

mous vote,³ or by implication from long-continued acquiescence,⁴ and retention of benefits.⁵ Prior to the allotment of shares the company may release a subscriber from liability, and the same degree of proof is not required as would be necessary after allotment. For example, where a director appointed in the act of incorporation soon afterwards resigned and all the shares were allotted to others, it was considered an abandonment by the company of its right to treat him as a shareholder, and a subsequent creditor of the corporation could not hold him liable as a subscriber.⁶ It may be received as sufficient evidence of a cancellation, without any record of the cancellation having been made upon the books of the corporation, that neither the subscriber nor the company regarded the subscriber as a stockholder.⁷ The death of a subscriber prior to the acceptance of his subscription by the corporation, is a revocation thereof.⁸

1 See Cook on Stock & Stockh. § 168.

2 Perkins v. Union etc. Co. 12 Allen, 273.

3 *Lake Ontario etc. R. R. Co. v. Mason*, 16 N. Y. 451, 463; *Selma etc. R. R. Co. v. Tipton*, 5 Ala. 787; 39 Am. Dec. 344; *Busey v. Hooper*, 35 Md 15; 6 Am. Rep. 350; *Johnson v. Wabash etc. R. R. Co.* 13 Ind. 389. Cf. *Cook v. Chittenden*, 25 Fed. Rep. 544; *Gelpecke v. Blake*, 19 Iowa, 263; *Marshall v. Glamorgan etc. Co.* Law R. 7 Eq. 129.

4 *Evans v. Smallcombe*, Law R. 3 H. L. Cas. 249.

5 *Miller v. Second*, 50 Pa. St. 32.

6 *Kiplin v. Todd*, 3 Com. P. 350; *Barry v. Navon etc. R'y Co.* Ir. Rep 11 Com. Law, 403.

7 *Stuart v. Valley R. R.* 32 Gratt. 146.

8 *Sedalia etc. R'y Co. v. Wilkinson*, 83 Mo. 235; *Wallace v. Townsend* 43 Ohio St. 537; 54 Am. Rep. 829.

§ 116. Cancellation—Of the consent of corporate creditors.—The consent of the creditors also must be unanimous; and any single creditor to whom the company was indebted before the time of

the cancellation may object, and have the transaction set aside,¹ notwithstanding that the remaining subscriptions would be sufficient to pay the debts of the company.² But one who becomes a creditor after a surrender and cancellation cannot object thereto, and hold the subscriber liable.³ Equity will regard the capital stock, contributed or agreed to be contributed, as a trust fund for the satisfaction of the corporate debts, and as against the creditors it is not competent for the shareholders, by by-law or resolution, to authorize the release of the obligation of a solvent shareholder upon his subscription, even though he agrees in return therefor to surrender his shares.⁴ In England, if the circumstances are such that the company cannot question the validity of the cancellation, the corporate creditors also are barred; for it is the rule in that country that the creditor can enforce no claim against the shareholder, except such as might have been enforced by the corporation itself.⁵

1 *Vick v. La Rochelle*, 57 Miss. 602; *Chouteau Insurance Co. v. Floyd*, 74 Mo. 286; *Gill v. Balis*, 72 Mo. 424; *In re Dronfield etc. Co.* 17 Ch. 76.

2 *Gill v. Balis*, 72 Mo. 424.

3 *Erskine v. Peck*, 83 Mo. 465.

4 *Farnsworth v. Robbins*, 33 Minn. 369.

5 *In re Dronfield etc. Co.* 17 Ch. 76.

§ 117. The directors have no authority to cancel subscriptions.—The consent of the corporation to a cancellation of a contract of subscription can not be given by the directors or governing officers. No such authority in them has ever been recognized,¹ unless expressly conferred upon them by articles of association, the act of incorporation, or

the by-laws of the company.³ The power to cancel the contract is not conferred by authority to forfeit the shares,³ or to effect a compromise,⁴ or to do anything conducive to the attainment of the objects of incorporation.⁵ Unpaid subscriptions constitute a trust fund for the benefit of creditors, and the corporate officers cannot impair the trust by accepting simulated or fictitious payment of subscriptions.⁶ And directors are personally liable to the company for any loss occasioned by a cancellation made by them without authority.⁷

1 *Burke v. Smith*, 16 Wall. 390; *New Albany v. Burke*, 11 Wall. 96; *Bedford R. R. Co. v. Bowser*, 48 Pa. St. 29; *Robinson v. Pittsburgh etc. R. R. Co.* 32 Pa. St. 334; 72 Am. Dec. 792; *Zirkel v. Joliet etc. Co.* 79 Ill. 334; *Ryder v. Alton etc. R. R. Co.* 13 Ill. 516; *White Mountains R. R. Co. v. Eastman*, 34 N. H. 124; *Jewett v. Valley R'y Co.* 34 Ohio St. 601.

2 *Teasdale's Case*, Law R. 9 Ch. 54; *Thomas's Case*, Law R. 13 Eq. 474; *Wright's Case*, Law R. 12 Eq. 334; *Colville's Case*, 48 Law J. Ch. 633.

3 *Richmond's Case*, 4 Kay & J. 305.

4 *Adams's Case*, Law R. 13 Eq. 474.

5 *In re Dronfield etc. Co.* 17 Ch. 76.

6 *Coffin v. Ransdell* (1887), 110 Ind. 417.

7 *Bank v. St. John*, 25 Ala. 563; *Hodgkinson v. National Co.* 26 Beav. 473.

§ 118. Mistake as a ground for rescission.—
 “Except where a person has induced others to act on his own representations, ignorance of material facts on his part affords a sufficient reason for not holding him bound by what in such ignorance he may have said or done.”¹ And where one signs a subscription paper, entirely misunderstanding the nature of the agreement, he may obtain release from the obligations thereby incurred.² But a subscriber cannot be released from the obligation of his contract by reason of misunderstanding the legal effect of his subscription;³ even though his misconception of the legal effect of his subscription arose from false

representations.⁴ For misrepresentations in regard to matters of law, which are supposed to be equally within the knowledge of both parties, do not amount to fraud.⁵ A subscriber who has, by mistake, agreed to take more shares than he intended, after allowing the company to act upon the faith of his subscription cannot obtain relief in equity in the absence of proof of fraud.⁶ Neither can the subscriber plead that he was ignorant of the true condition of the company's affairs.⁷

1 1 Lindley on Partnerships, 135; Taylor on Corporations, § 537; *Salem Mill Dam Co. v. Ropes*, 9 Pick. 187; *Payson v. Withers*, 5 Biss. 269; *Four Mile Valley R. R. Co. v. Bailey*, 18 Ohio St. 206.

2 *County of Schuylkill v. Copley*, 67 Pa. St. 336; *Smith v. Reese etc. Co.* Law R. 2 Eq. 264. *Cf. Rockford etc. R. R. Co. v. Schunck*, 13 Ill. 223.

3 *Bailey v. Hannibal etc. R. R. Co.* 17 Wall. 96; *Wight v. Shelby R. R. Co.* 16 Mon. B. 4; 63 Am. Dec. 522; *Ellison v. Mobile etc. R. R. Co.* 36 Miss. 672; *Helma etc. R. R. Co. v. Anderson*, 51 Miss. 129, 833; *New Albany etc. R. R. Co. v. Fields*, 10 Ind. 187; *Clear v. Newcastle R. R. Co.* 9 Ind. 433. *Cf. Vicksburg etc. R. R. Co. v. McKean*, 12 La. An. 638.

4 *Ellison v. Mobile etc. R. R. Co.* 36 Miss. 572, 538; *New Albany etc. R. R. Co. v. Fields*, 10 Ind. 187; *Clear v. Newcastle etc. R. R. Co.* 9 Ind. 438; 63 Am. Dec. 533.

5 *Infra*, § 137.

6 *Diman v. Providence etc. R. R. Co.* 5 R. I. 130.

7 *Payson v. Withers*, 5 Biss. 269.

§ 119. The directors have authority to compromise and to correct errors.—While a cancellation of a contract of subscription can be effected only by the unanimous consent of all the parties in interest—the stockholders and the corporate creditors—a compromise of a subscription may be validly made by the directors or corporate officers alone, provided that they act in good faith;¹ as where it appears more expedient to relinquish a part than to attempt to enforce the whole of a doubtful claim.² A solvent corporation may compromise its claims against a subscriber, and may

release him from a part of his subscription in order to secure the residue. But to effect a valid compromise it must appear either that there was a *bona-fide* dispute as to his liability, or doubt of his financial ability to pay the whole amount; and it must be shown that the release did not place the subscriber in any better position with respect to the shares retained by him, than that occupied by the other shareholders, and that the transaction did not operate as a fraud upon the other subscribers or the corporate creditors.³ But a receiver can not compromise subscriptions except by leave of court when all the stockholders are parties to the action.⁴ Where stock has been mistakenly registered in a wrong name,⁵ or where stock has been fictitiously issued as paid up;⁶ or there has been an unauthorized issue of a stock dividend, the directors may correct the mistake or cancel their *ultra vires* acts.⁷

1 Philadelphia etc. R. R. Co. v. Hickman, 28 Pa. St. 318.

2 Bath's Case, 8 Ch. Div. 334.

3 Wood's Railway Law, § 82; *Upton v. Tribilcock*, 91 U. S. 45; *Tuckerman v. Brown*, 33 N. Y. 207; 88 Am. Dec. 386; *Mann v. Pentz*, 2 Sand. Ch. (N. Y.) 257; *Macon etc. R. R. Co. v. Vason*, 57 Ga. 314; *Bedford etc. R. R. Co. v. Bowser*, 48 Pa. St. 29; *Philadelphia etc. R. R. Co. v. Hickman*, 28 Pa. St. 318; *Gaff v. Pittsburgh etc. R. R. Co.* 31 Pa. St. 489; *Swartwout v. Michigan etc. R. R. Co.* 24 Mich. 389; *Chandler v. Brown*, 77 Ill. 333; *Penobscot etc. R. R. Co. v. Dunn*, 39 Me. 587; *Bath's Case*, 8 Ch. Div. 334; *Kepling v. Todd*, — Com. P. 350; *Snell's Case*, Law R. 5 Ch. 22; *Sidney's Case*, Law R. 13 Eq. 228; *In re London etc. Co.* 5 Ch. 525; *Adamson's Case*, Law R. 13 Eq. 676; *Belhaven's Case*, 3 De Gex. J. & S. 41. But see *Sawyer v. Hoag*, 17 Wall. 610. Cf. *New Albany v. Burke*, 11 Wall. 96.

4 *Chandler v. Brown*, 77 Ill. 333. Cf. *Pearson's Case*, Law R. 7 Ch. 309.

5 *Ex parte Knightley*, Wood & M. 18 & 47; *Hartley's Case*, Law R. 10 Ch. 157.

6 *Barrett's Case*, Law R. 18 Eq. 507.

7 *Hollingshead v. Woodward*, 35 Hun, 410.

§ 120. Amendments of charter—Their operation as a release of the subscriber.—Any change

in the charter of a corporation, which materially affects the stockholder's liability, will release him from the obligation of his contract of subscription. A dissenting subscriber cannot be held bound by any action of the legislature or of a majority of the stockholders which varies in any essential feature the obligations assumed by him.¹ "Every owner of shares expects and stipulates with the other owners as a corporate body to pay them his proportion of the expenses, which a majority may please to incur in the prosecution of the particular objects of the corporation. To make a valid change in this special contract, as in any other, the consent of both parties is indispensable." The questions involved in this defense have been treated in a foregoing chapter, in connection with the amendment of charters.²

1 *Nixon v. Supervisors*, 19 Wall. 241; *Marsh v. Fulton County*, 10 Wall. 676; *Davis v. Sweeney*, 60 N. Y. 463; *Buffalo etc. R. R. Co. v. Dudley*, 14 N. Y. 536; *Hurrows v. Smith*, 10 N. Y. 560; *Tracy v. R. R. Co. v. Kerr*, 17 Barb. 5-1; *McDallough v. Mass.*, 1 Barb. 589; *Lyons v. Bank of N. Y.*, 4 Johns. Ch. 273; *Hartford etc. R. R. Co. v. Crocker*, 2 H. & C. 30; *Bank v. Charlotte*, 85 N. C. 433; *International R. R. Co. v. French*, 10 Tex. 96; *Pacific R. Co. v. Lonsdale*, 14 M. 210; *Waters v. Mississippi etc. R. R. Co.*, 20 Ark. 403; *South Georgia etc. R. R. Co. v. Ayres*, 5 Ga. 20; *Western v. Muscogee R. R. Co.*, 11 Ga. 436; *New Orleans etc. R. R. Co. v. Harris*, 27 Miss. 517; *Champion v. Memphis etc. R. R. Co.*, 3 Miss. 62; *Spruvel v. Memphis etc. R. R. Co.*, 32 Miss. 378; *Proctor v. Louisiana etc. R. R. Co.*, 9 Met. (Ky.) 314; *Keen v. Johnson*, 9 N. J. Eq. 413; *Starr v. Evansville etc. R. R. Co.*, 7 Ind. 364; *Union Grand Trunk R. R. Co. v. C. & A. Co.*, 257, *Knoxville etc. R. R. Co. v. Marsh*, 17 Wis. 15; *Derry v. Marshfield*, 1 P. R. Co. 26; *Ohio St. 673*; *Marietta etc. R. R. Co. v. Thet*, 100 Ind. 287; *Rutland etc. R. R. Co. v. Thet*, 35 Vt. 536; *Stromer v. Rutland etc. R. R. Co.*, 10 Vt. 545; *Southern Pennsylvania etc. R. R. Co. v. Stevens*, 87 Pa. St. 140; *Feverant v. West Chester R. R. Co.*, 28 Pa. St. 339; *Barrett v. Alton etc. R. R. Co.*, 13 Ill. 504; *Carlisle v. Terre Haute etc. R. R. Co.*, 6 Ind. 316; *Of. Ellison v. Mobile etc. R. R. Co.*, 36 Miss. 571.

2 *Union Locks etc. Canal Co. v. Towne*, 1 N. H. 44; 3 Am. Dec. 22.

3 *Vide supra*, ch. 1.

§ 121. The same subject continued and illustrated.—Dissenting subscribers have been held released by such fundamental changes as an amend-

ment to the charter of a railway company authorizing the purchase and operation of a steamboat line,¹ or an alteration of the charter authorizing a railway to change its terminus and to go over a different route;² or alteration of the charter authorizing an extension of the road.³ But subscribers and shareholders are not relieved of their liability by alterations of the charter which are not fundamental, being made only for the purpose of facilitating the accomplishment of the original design,⁴ such as an amendment authorizing the company to mortgage its property;⁵ or to issue preferred stock;⁶ or to change the manner of paying for stock;⁷ or amendments conferring upon the directors certain powers theretofore exercised by the shareholders;⁸ or changing the manner of serving process upon the company,⁹ or changing the name of the corporation,¹⁰ or granting an extension of time for the completion of the road.¹¹

1 *Hartford etc. R. R. Co. v. Croswell*, 5 Hill, 383; 40 Am. Dec. 354.

2 *Winter v. Muscogee R. R. Co.* 11 Ga. 438.

3 *Stevens v. Rutland etc. R. R. Co.* 29 Vt. 545.

4 *Stevens v. Rutland etc. R. R. Co.* 29 Vt. 545.

5 *Joy v. Jackson etc. Plank Road Co.* 11 Mich. 155.

6 *Everhart v. West Chester etc. R. R. Co.* 28 Pa. St. 339.

7 *Illinois etc. R. R. Co. v. Beers*, 27 Ill. 185; *Illinois etc. R. R. Co. v. Zimmer*, 20 Ill. 64.

8 *Payson v. Stoeber*, 2 Dill. C. C. 427; *East Tennessee etc. R. R. Co. v. Gammon*, 5 Sneed (Tenn.) 567.

9 *Railroad Co. v. Hecht*, 94 U. S. 108.

10 *Epps v. Mississippi etc. R. R. Co.* 35 Ala. 33; *Reading v. Wedder*, 66 Ill. 80; *Delaware etc. R. R. Co. v. Ireck*, 23 N. J. 321; *Rutland etc. R. R. Co. v. Thrall*, 35 Vt. 536; *Wood's Railway Law*, § 41.

11 *Jacks v. Helena*, 41 Ark. 213.

§ 122. Irregular incorporation—Its operation as a release of the subscriber.—It is laid down as a general rule that where there is a corporation de

fac'o, persons who have entered into contract relations with it as corporators or otherwise should not be suffered to raise questions as to the exact regularity and strict compliance with the provisions of the law relating to incorporation.¹ But it is submitted that of the cases enunciating this general principle, such as relate to the contract of subscription will be found to turn upon the subscriber's acquiescence, or upon the doctrine of estoppel; as where he had acted as a director,² or had paid calls,³ or accepted shares,⁴ or had paid for one of his shares,⁵ or had participated in an election,⁶ or other acts recognizing the corporate existence of the company. Accordingly, this rule does not extend to subscriptions made prior to incorporation, for such a subscription in no wise recognizes the incorporation of the company, and the subscriber is entitled to insist upon the regular and legal organization of the corporation, or to be released from the obligations of his undertaking.⁷ For incorporation, it is said, is an indispensable condition precedent to the enforcement of a contract of subscription.⁸ Where, however, the company has acquired a *de facto* corporate existence, subscribers cannot plead irregularities in its organization in an action involving either directly or indirectly the rights of creditors.⁹ But if no creditors' rights have supervened, and the subscriber be not estopped from denying the validity of his subscription, as by part payment thereon, or by voting at corporate meetings, or by acting as director of the company, he may plead as a defense to a suit to enforce his subscription the irregular organization of the corporation.¹⁰ An action for money had and received

will not lie in favor of one of the shareholders of a corporation, the attempted organization of which was invalid, against others for the purchase price paid by him for stock, which he was led to buy through the alleged fraud of one of them, it appearing that such shareholders were equally *bona fide* with himself, and have suffered equally from the fraud; and this is true even though the shareholders be liable as partners.¹¹

1 *Swartwout v. Michigan etc. R. R. Co.* 24 Mich. 339, per COOLEY, J.; *Tar River etc. Co. v. Neal*, 3 Hawks (N. C.) 520; *Wilmington etc. R. R. Co. v. Thompson*, 7 Jones (N. C.) 387; *Danbury etc. R. R. Co. v. Wilson*, 22 Conn. 435; *Hanover etc. R. R. Co. v. Haldeman*, 82 Pa. St. 31. See also *Garrett v. Dillsburg etc. R. R. Co.* 73 Pa. St. 465, where the plea was that the charter had been fraudulently obtained.

2 *Weinman v. Wilksburg etc. R'y Co.* (1888) 13 Pa. St. 192; *Rice v. Rock Island etc. R. R. Co.* 21 Ill. 93; *Danbury etc. R. R. Co. v. Wilson*, 22 Conn. 435; *Meadow v. Gray*, 30 Me. 547; *Hunt v. Kansas etc. Co.* 11 Kan. 412.

3 *Maltby v. Northwestern etc. R. R. Co.* 16 Md. 422.

4 *Inter-Mountain etc. Co. v. Jack*, 5 Mont. 563.

5 *Bell's Appeal* (1887), 115 Pa. St. 88.

6 *Rockville etc. Co. v. Van Ness*, 2 Cranch C. C. 449.

7 *Reed v. Richmond Street R. R. Co.* 50 Ind. 240; *Taggart v. Western Maryland R. R. Co.* 24 Md. 563; *Dorris v. Sweeney*, 60 N. Y. 431. *Contra*: *Bell's Appeal* (1887), 115 Pa. St. 88, a late case apparently *contra*, turns upon the subsequent acts of the subscriber estopping him from denying the irregularity of the incorporation.

8 *Dorris v. Sweeney*, 60 N. Y. 463; *Low v. Connecticut etc. R. R. Co.* 45 N. H. 370; *Richmond Street R'y Co. v. Reed*, 83 Ind. 9; *Monterey etc. R. R. Co. v. Hildreth*, 53 Cal. 123. *Cf.* *Danbury etc. R. R. Co. v. Wilson*, 22 Conn. 435; *Daman v. Providence etc. R. R. Co.* 5 R. I. 130; *Marlborough etc. R. R. Co. v. Arnold*, 9 Gray, 159; 60 Am. Dec. 279; *Buffalo etc. R. R. Co. v. Hatch*, 20 N. Y. 157; *Garrett v. Dillsburg etc. R. R. Co.* 73 Pa. St. 465; *Midland etc. R'y Co. v. Gordon*, 16 Mees. & W. 804. *Contra*, *Oregon etc. R. R. Co. v. Scroggin*, 3 Or. 161.

9 *Clark v. Thomas*, 34 Ohio St. 46; *Hinkling v. Wilson*, 104 Ill. 54; *Upton v. Hansbrough*, 3 Biss. 317; *Thompson v. Reno Savings Bank* (1835), 10 Nev. 13; 3 Am. Rep. 737, and elaborate note, pp 806-878.

10 *Kansas City Hotel Co. v. Hunt*, 57 Mo. 126.

11 *Perry v. Hale*, 143 Mass. 510.

§ 123. **Illegal and wrongful acts of the corporate managers.**—A subscriber cannot plead in defense to an action to enforce his subscription that the directors of the corporation have been guilty of

ultra vires acts.¹ Thus, a plea that the company has sold or leased its road is bad on demurrer, for if there was authority for the sale or lease, the subscriber would not be released, and if the act were *ultra vires*, it is void, and does not affect his rights.² So a change of the location of a railway, made by the directors without authority of law, does not release the subscribers from liability,³ and fraud and mismanagement of the directors, such as accepting payment for shares in property at an overvaluation,⁴ or purchasing property for the company at an overvaluation,⁵ or making a fraudulent contract with a construction company,⁶ constitute no defense to an action to enforce payment of the subscription.⁷ Nor will it avail the subscriber to plead that insufficient notice of the election of directors was given,⁸ or that officers of the company were illegally elected.⁹ The only remedy which a subscriber has against the illegal, unauthorized, or wrongful acts of the directors and managers of a corporation, is through the intervention of a court of equity.¹⁰

1 *Dorris v. French*, 4 Hun, 292; *Troy etc. R. R. Co. v. Kerr*, 17 Barb. 581; *South Georgia etc. R. R. Co. v. Ayres*, 56 Ga. 230; *Mississippi etc. R. R. Co. v. Gastner*, 20 Ark. 455; *Hammett v. Little Rock etc. R. R. Co.* 20 Ark. 204; *Hannibal etc. R. R. Co. v. Menifee*, 25 Mo. 547; *Vicksburg etc. R. R. Co. v. McKean*, 12 La. An. 638; *Illinois etc. R. R. Co. v. Cook*, 29 Ill. 237; *Illinois Midland R'y Co. v. Supervisors*, 85 Ill. 313; *Ottawa etc. R. R. Co. v. Black*, 79 Ill. 262; *Chicago etc. R. R. Co. v. McGinnis*, 79 Ill. 269; *Hays v. Ottawa etc. R. R. Co.* 61 Ill. 422; *Johnson v. Crawfordsville etc. R. R. Co.* 11 Ind. 280; *Tutt'e v. Michigan etc. R. R. Co.* 35 Mich. 247; *Bucksport etc. R. R. Co. v. Buck*, 63 Me. 81; *Merrill v. Reaver*, 50 Iowa, 404.

2 *Ottawa etc. R. R. Co. v. Black*, 79 Ill. 232; *Hayes v. Ottawa etc. R. R. Co.* 61 Ill. 422; *Taylor on Corporations*, § 529. But see *South Georgia etc. R. R. Co. v. Ayres*, 56 Ga. 230.

3 *Mississippi etc. R. R. Co. v. Cross*, 20 Ark. 443. But see *Chartiers R. R. Co. v. Hodgins*, 77 Pa. St. 187.

4 *Maccow v. Indiana etc. R. R. Co.* 9 Ind. 262; *Hornady v. Indiana etc. R. R. Co.* 9 Ind. 263.

5 *Dorris v. French*, 4 Hun, 292; *Hornaday v. Indiana etc. R. R. Co.* 9 Ind. 263.

6 *People v. Logan County*, 63 Ill. 374, 337.

7 *Cook on Stock & Stockh.* § 188.

8 *Eastern Plank Road Co. v. Vaughan*, 14 N. Y. 546; *Central Plank Road Co. v. Clemens*, 16 Mo. 300.

9 *Bucksport etc. R. R. Co. v. Buck*, 68 Me. 81; *Exright v. Logansport etc. R. R. Co.*, 13 Ind. 404; *Johnson v. Crawfordville etc. R. R. Co.*, 11 Ind. 283.

10 *Wood's Railway Law*, § 45.

§ 124. **Failure or refusal to issue a certificate of stock.**—As has been said heretofore, the ownership of shares, and the rights and liabilities of shareholders, are quite independent of possession of the certificate of stock.¹ Accordingly, a mere failure on the part of the corporation to tender a certificate to a subscriber, is no ground for a refusal on the part of the latter to pay his subscription;² unless the delivery of the certificate has been stipulated for in the contract of subscription,³ or unless the failure arises from the whole capital stock having been already issued to others.⁴ But a refusal to issue a certificate when demanded may release the subscriber. Thus, if the defendant can show that while the corporation was yet solvent, he tendered the full amount of his subscription, demanding a certificate of stock, which was refused, it is a good defense even to an action by the assignee of the company brought in behalf of the corporate creditors.⁵ While ordinarily a tender of a certificate of stock is not a condition precedent to the enforcement of calls upon a subscription,⁶ unless made so by the terms of the contract,⁷ yet it is necessary when the action is for the whole subscription, or for the last installment thereof.⁸ And in actions to enforce subscriptions the corporation must aver a willingness to deliver the certificate.⁹

- 1 *Supra*, § 81. And see *Fulgam v. Macon etc. R. R. Co.* 44 Ga. 697.
- 2 *Miller v. Wildcat Gravel Road Co.* 23 Ind. 51; *Henson v. Cincinnati etc. R. R. Co.* 16 Ind. 275; 79 Am. Dec. 439; *New Albany etc. R. R. Co. v. McCormick*, 13 Ind. 439; 71 Am. Dec. 337; *Chandler v. Northern Cross R. R. Co.* 16 Ill. 130; *Kenned v. etc. R. R. Co. v. Jarvis*, 34 Me. 360.
- 3 *Hawley v. Upton*, 102 U. S. 314; *Wheeler v. Millar*, 93 N. Y. 333; *S. C. 21 Hun*, 541; *South Georgia etc. R. R. Co. v. Ayers*, 53 Ga. 231; *Fulgam v. Macon etc. R. R. Co.* 44 Ga. 537; *Vawter v. Ohio etc. R. R. Co.* 16 Ind. 171.
- 4 *Burrows v. Smith*, 13 N. Y. 530.
- 5 *Potts v. Wallace*, 31 Fed. Rep. 272.
- 6 *Fulgam v. Macon etc. R. R. Co.* 44 Ga. 697; *Taylor on Corporations* § 620. " Cf. *Cheltenham & C. Ry. Co. v. Daniel*, 2 Eng. Ry. Cas. 723. See, however, *St. Paul & C. R. R. Co. v. Robbins*, 23 Minn. 439.
- 7 *Courtright v. Duda*, 37 Iowa, 603.
- 8 *Clark v. Continental etc. Co.* 57 Ind. 133.
- 9 *James v. Cincinnati etc. R. R. Co.* 2 Dis. 261.

§ 125. **The release of other subscribers not a valid defense.**—Ordinarily it is no ground for defense to an action to enforce payment of a subscription, that the directors have released other subscribers from their contracts, although circumstances may exist which will render it a valid defense.¹ Contracts of subscription being several and not joint, the fact that other subscriptions have been released or canceled,² or that the shares of some subscribers have been forfeited and the subscriptions of others compromised,³ or that other subscribers have neglected to make the cash deposit required by statute at the time of subscribing,⁴ or that special secret concessions have been made to other subscribers, do not constitute a valid defense to an action to enforce payment of a subscription.⁵

- 1 *Memphis Branch R. R. Co. v. Sullivan*, 57 Ga. 240; *Macon etc. R. R. Co. v. Vason*, 57 Ga. 314; *Wool's Railway Law*, § 43.
- 2 *Benselmer etc. Plank Road Co. v. Wetall*, 21 Barb. 56.
- 3 *Dorman v. Jacksonville etc. Plank Road Co.* 7 Fla. 265.
- 4 *Swartwout v. Michigan etc. R. R. Co.* 21 Mich. 369.
- 5 *Memphis Branch R. R. Co. v. Sullivan*, 57 Ga. 240; *Hall v. Selma R. R. Co.* 6 Ala. 74; *Jewell v. Rock River etc. Co.* 101 Ill. 57; *Anderson v. New-*

castle etc. R. R. Co. 12 Ind. 376; 74 Am. Dec. 218; *Connecticut etc. R. R. Co. v. Bailey*, 24 Vt. 465; 58 Am. Dec. 181; *Jewett v. Valley R'y Co.* 34 Ohio St. 601. But see *New York Exchange Co. v. DeWolf*, 31 N. Y. 270, reversing S. C. 5 Bosw. 593; *Berry v. Yates*, 25 Barb. 199; *Rutz v. Ester etc. Co.* 3 Bradw. (Ill.) 83.

§ 126. **Failure to make cash deposit required by statute**—The general rule.—When it is required by the act of incorporation that subscriptions to stock must be accompanied by a cash payment of a part of the purchase price, the subscriber cannot take advantage of his own wrong to impeach the validity of his subscription on the ground that no payment was made. Such a defense is most ungracious, and "should not be allowed unless it is strictly required by some inflexible rule of law."¹ While such statutory requirements confer upon the corporation the right to insist upon the payment, the waiver of its right does not invalidate the subscription.² In England the only effect of a failure to make the cash deposit is to restrict the subscribers' right to transfer his shares.³

¹ *Illinois River R. R. Co. v. Zimmer*, 20 Ill. 654; *Oler v. Baltimore etc. R. R. Co.* 41 Md. 583; *Pittsburgh etc. R. R. Co. v. Applegate*, 21 W. Va. 172; *Haywood etc. R. R. Co. v. Bryan*, 6 Jones (N. C.), 82; *Barrington v. Mississippi etc. R. R. Co.* 32 Miss. 370; *Fiser v. Mississippi etc. R. R. Co.* 32 Miss. 359; *Wight v. Shelby R. R. Co.* 16 Mon. B. 4; *Vicksburg etc. R'y Co. v. McKean*, 12 La. An. 638; *Mitchell v. Rome R. R. Co.* 17 Ga. 574; *Spartanburg etc. R. R. Co. v. Ezell*, 14 S. C. 281; *Stuart v. Valley R. R. Co.* 32 Gratt. 146; *Selma etc. R. R. Co. v. Roundtree*, 7 Ala. 670; *Klein v. Alton etc. R. R. Co.* 13 Ill. 514; *Ryder v. Alton etc. R. R. Co.* 13 Ill. 516; *Ashtabula etc. R. R. Co. v. Smith*, 15 Ohio St. 328; *Chamberlain v. Painesville etc. R. R. Co.* 15 Ohio St. 225; *Henry v. Vermilion etc. R. R. Co.* 17 Ohio, 191; *Minnesota etc. R'y Co. v. Bassett*, 20 Minn. 535; *Cf. People v. Stockton etc. R. R. Co.* 45 Cal. 306; 13 Am. Rep. 178; *McRae v. Russell*, 12 Ired. 224; *Vermont Central R. R. Co. v. Clayer*, 21 Vt. 33; *Hall v. Selma etc. R. R. Co.* 6 Ala. 741; *Greenville etc. R. R. Co. v. Woodsides*, 5 Rich. 145; 55 Am. Dec. 708; *Blair v. Rutherford*, 31 Tex. 465; *Garrett v. Dillsburgh etc. R. R. Co.* 78 Pa. St. 465.

² *Minnesota etc. R'y Co. v. Bassett*, 20 Minn. 535; *Illinois River R. R. Co. v. Zimmer*, 20 Ill. 654.

East Gloucestershire R'y Co. v. Bartholomew, Law R. 3 Ex. 15.

statute — **The New York and Pennsylvania rule.** Contrary to the general rule, the courts of New York have, after some wavering, finally decided that a failure to pay the required percentage at the time of subscribing, may be taken advantage of by the subscriber to avoid liability upon his contract.¹ A few cases in other States follow the New York rule.² It has been held in Pennsylvania also that a failure to comply with the requirement may be pleaded in defense to actions to enforce subscriptions.³ But only *unconditional* subscriptions,⁴ taken by *commissioners*,⁵ and *after* the incorporation of the company, may be thus impeached.⁶ And the subscriber may be estopped to deny the validity of the contract by transferring his shares,⁷ or by attending and voting at corporate meetings.⁸ In New York, the defect cannot be cured by subsequent statute;⁹ but in Pennsylvania it may.¹⁰

1 *New York etc. R. R. Co. v. Van Horn*, 37 N. Y. 473; *Jenkins v. The Union Turnpike Co.* 1 Calnes Cas. 86, reversing *Union Turnpike Co. v. Jenkins*, 1 Calnes 381. Cf. *Ramsdell etc. Co. v. Barton*, 14 N. Y. 437, doubting *Jenkins v. The Union Turnpike Co.* 1 Calnes Cas. 86, supra, *Crocker v. Crane*, 21 Wend. 211, 34 Am. Dec. 221, *Thorpe v. Woodhull*, 1 Sand. Ch. 411; *Easter v. Plank Road Co. v. Vaughan*, 14 N. Y. 546, *Highland Turnpike Co. v. McKean*, 11 Johns. 98, *Black River etc. R. R. Co. v. Clarke*, 25 N. Y. 208; *Lake Ontario etc. R. R. Co. v. Mason*, 18 N. Y. 451; *Ogdensburgh etc. R. R. Co. v. Woolley*, 3 Abb. Dec. 266, *Ogdensburgh etc. R. R. Co. v. Frost*, 21 Barb. 541.

2 *People v. Chambers*, 43 Cal. 261; *Farmers' etc. Bank v. Nelson*, 12 Md. 35; *Taggart v. Western Maryland R. R. Co.* 34 Md. 563; 37 Am. Dec. 760; *Charlotte etc. R. R. Co. v. Halsey*, 3 Strob. Eq. 245; *Wood v. Ocean etc. R. R. Co.* 32 Ga. 273.

3 *Hibernia Turnpike Co. v. Henderson*, 8 Serg. & R. 219; 11 Am. Dec. 889; *Leighly v. Susquehanna etc. Turnpike Co.* 14 Serg. & R. 434. Cf. *Dryd v. Panch Bottom R'y Co.* 60 Pa. 84, 169.

4 *Hanover etc. R. R. Co. v. Haldeman*, 61 Pa. 64, 34.

5 *Philadelphia etc. R. R. Co. v. Hickman*, 26 Pa. 84, 315. Cf. *Ditcher v. Dellsburg etc. R. R. Co.* 75 Pa. 64, 266.

6 *Garrett v. Dellsburg etc. R. R. Co.* 75 Pa. 64, 465.

7 *Everhart v. Westchester etc. R. R. Co.* 26 Pa. 66, 266.

8 *Kris etc. Plank Road v. Brown*, 26 Pa. 84, 169.

9 New York etc. R. R. Co. v. Van Horn, 57 N. Y. 473.

10 Clark v. Monongahela Navigation Co. 10 Watts, 364.

§ 128. **Parol agreements and conditions.**—A written contract of subscription, absolute in its terms, cannot, in the absence of accident, fraud or mistake, be contradicted or varied by parol,¹ nor even by a separate written contract made at the same time;² and all parol agreements and conditions made at the time of subscribing, and inconsistent with the written contract, are void.³ When, however, the whole contract of subscription was originally oral, and afterwards a part only was reduced to writing, parol evidence is admissible to prove the whole original contract.⁴ There are cases in Pennsylvania holding that parol evidence is admissible to contradict the written contract, if it be shown that had it not been for the parol agreement the subscription would not have been made;⁵ and provided the interests of other stockholders are not thereby impaired.⁶ But as a general rule, parol declarations made by officers of the company can only avail a subscriber to invalidate his subscription when they amount to fraud.⁷

1 Whitehall etc. R. R. Co. v. Myers, 16 Abb. Pr. N. S. 34; Ellison v. Mobile etc. R. R. Co. 33 Miss. 572; Mississippi etc. R. R. Co. v. Cross, 20 Ark. 443; Johnson v. Pensacola etc. R. R. Co. 9 Fla. 299; North Carolina R. R. Co. v. Leach, 4 Jones (N. C.) 340; *East Tennessee etc. R. R. Co. v. Gammon*, 5 Sneed, 567; Wight v. Shelby R. R. Co. 16 Mon. B. 4; 63 Am. Dec. 522; McClure v. People's Freight R'y Co. 9 Pa. St. 259; Dill v. Wabash Valley R. R. Co. 21 Ill. 91; Ridgefield etc. R. R. Co. v. Brush, 43 Conn. 86; Braddock v. Philadelphia etc. R. R. Co. 45 N. J. 363; Kennebeck etc. R. R. Co. v. Waters, 34 Me. 369; Keller v. Johnson, 11 Ind. 337; 71 Am. Dec. 355; Evansville etc. R. R. Co. v. Posey, 12 Ind. 363; Thornburgh v. Newcastle, etc. R. R. Co. 14 Ind. 499; Cincinnati etc. R. R. Co. v. Pearce, 28 Ind. 502; New Albany etc. R. R. Co. v. Fields, 10 Ind. 187; New Albany etc. R. R. Co. v. Slaughter, 10 Ind. 218; Eakright v. Logansport etc. R. R. Co. 13 Ind. 404; Carlisle v. Evansville etc. R. R. Co. 13 Ind. 477; McAllister v. Indianapolis etc. R. R. Co. 15 Ind. 11; Thigpen v. Mississippi Central R. R. Co. 32 Miss. 347; Henry v. Vermilion etc. R. R. Co. 17 Ohio, 187; Robinson v. Pittsburgh etc. R. R. Co. 32 Pa. St. 334; 72 Am. Dec. 792; Graff v. Pittsburgh etc. R. R. Co. 91 Pa. St. 489; *Connecticut etc. R. R.*

Co. v. Bailey, 24 Vt. 465; 58 Am. Dec. 181. *Contra*, *Mahan v. Wood*, 41 Cal. 462, where the par value of the shares was not what was promised; *Rices v. Montgomery* etc. Plank R. Co. 33 Ala. 92.

2 *White Mountain R. R. Co. v. Eastman*, 34 N. H. 124; *Brownlee v. Ohio* etc. R. R. Co. 18 Ind. 68.

3 *Whitehead* etc. R. R. Co. v. *Myers*, 16 Abb. Fr. N. S. 34; *Mississippi* etc. R. R. Co. v. *Cross*, 29 Ark. 443; *Thigpen v. Mississippi Central* etc. R. Co. 32 Miss. 247; *Cunningham v. Edgefield* etc. R. R. Co. 2 Hea 1 (1882); 23; *Miller v. Hanover Junction R. R. Co.* 87 Pa. St. 85; 30 Am. Rep. 343; *North Carolina R. R. Co. v. Leach*, 4 Jones (N. C.) 310; *Connecticut* etc. R. R. Co. v. *Baileys*, 24 Vt. 465; 58 Am. Dec. 181; *Blodgett v. Merrill*, 2 Vt. 51; *Evansville* etc. R. R. Co. v. *Posey*, 12 Ind. 353; *Johnson v. Crawfordsville* etc. R. R. Co. 11 Ind. 260. But see *RineSmith v. People's Freight R'y Co.* 93 Pa. St. 262.

4 *Brewers' Fire Insurance Co. v. Burger*, 10 Hun. 56; *Dross v. Cairo* etc. R. R. Co. 9 Bradw. 333. *Cf.* *Elghmie v. Taylor*, 98 N. Y. 238; *Hendrix v. Academy of Music*, 73 Ga. 437.

5 *RineSmith v. People's Freight R'y Co.* 90 Pa. St. 262; *Caloy v. Philadelphia* etc. R. R. Co. 83 Pa. St. 363.

6 *McCarty v. Bellingsgrove* etc. R. R. Co. 87 Pa. St. 332; *Miller v. Hanover* etc. R. R. Co. 87 Pa. St. 95; 30 Am. Rep. 349. *Cf.* *Pulford v. Richards*, 11 Beav. 87.

7 *Martin v. Pensacola* etc. R. R. Co. 8 Fla. 370; 73 Am. Dec. 713; *Vicksburg* etc. R. R. Co. v. *McKean*, 12 La. An. 638; *Mississippi* etc. R. R. Co. v. *Cross*, 29 Ark. 443; *Taylor on Corporations*, § 97, n.

§ 129. **Fictitious subscriptions to influence others, enforceable.**—A subscriber cannot successfully plead that his subscription was fictitious and that the company was a party to the fraud. It will be enforced for the benefit of the other subscribers and of the corporate creditors;¹ for secret agreements that subscriptions shall be colorable merely, or dischargeable upon part payment, are void as a fraud upon the other subscribers.² Thus, a subscription made for the purpose of inducing others to take stock, with a secret agreement between the subscriber and the directors that the former might reduce the number of shares thus taken by him, is enforceable to the full amount, the secret agreement being a fraud upon the other subscribers.³ So, also, is it held that if a person subscribe for the purpose of influencing others, leaving the number of shares to be taken by him blank, in

order afterward to withdraw, the blank may be filled by the agents of the company, and the subscriber will be bound thereby.⁴ Where, however, a subscription was made upon condition that after a certain time the subscriber might relinquish his shares and take back a note given in payment therefor, the note itself containing the same condition, and the other shareholders not having been deceived as to the nature of the contract, it was decided that the subscriber was entitled to be released.⁵ One who has taken charge of a subscription book and entered his own name therein, and induced others also to subscribe, cannot by cutting his name out relieve himself from the obligations of his contract.⁶ But prior to the date of filing of the certificate from which the incorporation of the company dates, under the New York General Railroad Act of 1850, a promoter who retains possession thereof may erase or alter his subscription thereto notwithstanding that he has induced others to subscribe.⁷

1 *Phoenix etc. Co. v. Hedger*, 6 Hun, 293, affirmed in 67 N. Y. 234; *Graff v. Pittsburg etc. R. R. Co.* 31 Pa. St. 489; *Robinson v. Pittsburg etc. R. R. Co.* 32 Pa. St. 334; 72 Am. Dec. 792.

2 *Robinson v. Pittsburg etc. R. R. Co.* 32 Pa. St. 334; 72 Am. Dec. 792; *Downie v. White*, 10 Wis. 176; 78 Am. Dec. 731.

3 *White Mt. R. R. Co. v. Eastman*, 31 N. H. 124; *Crawford v. Pittsburg etc. R. R. Co.* 32 Pa. St. 141; *Robinson v. Pittsburg etc. R. R. Co.* 32 Pa. St. 331; 72 Am. Dec. 792; *Downie v. White*, 12 Wis. 176; 78 Am. Dec. 731.

4 *Jewell v. Rock River etc. Co.* 101 Ill. 57.

5 *Jones v. Johnson* (1868), 86 Ky. 530.

6 *Greer v. Chartiers R. R. Co.* 96 Pa. St. 391; 42 Am. Rep. 549; *Railroad Co. v. White*, 10 S. O. 155.

7 *Burt v. Farrar*, 24 Barb. 518.

§ 180. **Fraudulent misrepresentation inducing the subscription.**—Fraud on the part of the company or its agents inducing the subscription en-

titles a subscriber to have the contract rescinded and his money returned, provided he apply for relief as soon as the fraud is discovered.¹ Thus, where a railway company, by a promise of collateral securities, induced a party to subscribe to a road it proposed to build, and, after part payment on the subscription, placed the collaterals beyond the reach of the subscriber, in violation of the original agreement, he was declared relieved from his obligations.² A subscription induced by fraud, however, is not absolutely void, but voidable only. Accordingly, in order to set it aside, the subscriber, after the discovery of the fraud, must promptly disaffirm the contract.³ Fraud may be pleaded by way of defense to an action to enforce an assessment, even though it was levied to pay the expenses of the company.⁴ But a court of equity will not release a subscriber on the ground of fraud, when by so doing other subscribers, or the creditors of the corporation, would be injured thereby.⁵ Parol evidence is admissible to prove fraudulent misrepresentations.⁶ The promoters also are liable in damages for misrepresentations made by them.⁷

1 *Central R'y Co. v. Kitch*, Law R. 2 H. L. Cas. 99; *Hayman v. European Central R'y Co.* 7 Eq. 154.

2 *Re Jones v. Mexican National Construction Co.*, 22 Fed. Rep. 532.

3 *Chubb v. Upton*, 95 U. S. 686; *Upton v. Tribilcock*, 91 U. S. 45; *Upton v. Englishart*, 3 Dill. 496; *Ogilvie v. Knox Insurance Co.* 23 How. 360; *Cunningham v. Edgefield etc. R. R. Co.* 2 Head (Tenn.), 90; *Parks v. Evansville etc. R. R. Co.* 23 Ind. 567; *Davis v. Dumont*, 37 Iowa, 47; *Oakes v. Tullahoma, Law R.* 2 H. L. 325.

4 *ITCHFIELD BANK v. PECK*, 20 Conn. 364; *Brockwell's Case*, 39 Law T. 375. But see *Ogilvie v. Knox Insurance Co.* 23 How. 360.

5 *Chubb v. Upton*, 95 U. S. 686; *Müller v. Hanover Junction R. R. Co.* 87 Pa. 84, 95; 30 Am. Rep. 349; *Graff v. Pittsburg etc. R. R. Co.* 31 Pa. St. 489.

6 *New York Exchange Co. v. De Wolf*, 31 N. Y. 373; S. C. 5 Bosw. 593; *Barrows v. Smith*, 10 N. Y. 530; *Ellison v. Mobile etc. R. R. Co.* 36 Miss. 672; *Walker v. Mobile etc. R. R. Co.* 41 Miss. 245; *Hester v. Memphis R.*

Railroad Co. 17 Tex. 562; 67 Am. Dec. 675; *Wight v. Shelby R. R. Co.* 16 Mo. B. 4; 63 Am. Dec. 522; *Keenebec R. R. Co. v. Waters*, 34 Me. 357; *Connecticut etc. R. R. Co. v. Baxter*, 23 Va. 835; *Connecticut etc. R. R. Co. v. Bailey*, 21 Va. 435; 58 Am. Dec. 181; *Blodgett v. Morrill*, 20 Vt. 539; *Piscataway Ferry Co. v. Jones*, 30 N. H. 491; *Jewett v. Valley Ry. Co.* 34 Ohio St. 601.

7 *Paddock v. Fletcher*, 42 Va. 389.

§ 131. What facts must be shown in support of an allegation of fraudulent misrepresentation. To support an allegation of fraudulent misrepresentation, it must be shown that the misrepresentations were made by an authorized agent of the corporation acting in the line of his employment,¹ or that they were contained in a prospectus or report issued by the authority of the company;² that the misrepresentation consisted either of a statement of falsehood or a suppression of truth,³ either of a statement of what was known *not* to be true, or of what was not *known* to be true, by one whose duty it was to know;⁴ it must be shown that the misrepresentation was in relation to a matter of which the subscriber had not the means of knowing the truth as well as the agent;⁵ that the misrepresentation related to a matter of fact as distinguished from mere matter of opinion,⁶ or sanguine expectation,⁷ and to a matter of fact as distinguished from a matter of law;⁸ that the misrepresentation was in regard to a matter materially affecting the status of the company;⁹ it must be shown that the agent of the company intended that his statement should influence the action of the subscriber;¹⁰ it must appear that the subscriber relied upon the truth of the misrepresentation,¹¹ and that it constituted a material inducement to him to enter into the contract.¹² The fact that a fictitious

subscription by an influential person was shown to a subscriber to induce him to subscribe is not of itself sufficient to enable him to avoid liability upon his contract; he must show also that, relying upon the supposed subscription, he was thereby induced to sign.¹³

1 *Infra*, § 132.

4 *Infra*, § 134.

7 *Infra*, § 133.

2 *Infra*, § 133.

5 *Infra*, § 135.

8 *Infra*, § 137.

3 *Infra*, § 134.

6 *Infra*, § 136.

9 *Infra*, § 138.

10 *Kennedy v. Panama Royal Mail Co.* Law R. 2 Q. B. 580; *Thom v. Bigland*, 8 Ex. 725; *Attwood v. Small*, 2 Clark & F. 232; *Taylor v. Ashton*, 11 Mees. & W. 415.

11 *Linnett v. Malis*, 33 Iowa, 25; *Melendy v. Keen*, 89 Ill. 395; *Mitchell v. Deeds*, 49 Ill. 416; 95 Am. Dec. 621; *Kish v. Central R'y of Venezuela*, 3 De Gex, J. & S. 122.

12 *Selma etc. R. R. Co. v. Anderson*, 51 Miss. 829; *Kennedy v. Panama Royal Mail Co.* Law R. 2 Q. B. 580.

13 *Walker v. Meble etc. R. R. Co.* 34 Miss. 245.

§ 132. Of the authority of the agent making the misrepresentations.—In order that fraud may be plead successfully by way of defense, it must be shown that the person making the misrepresentations was the authorized agent of the company;¹ and that he had authority to act for the corporation in obtaining subscriptions.² The mere fact that he was an officer or shareholder will not suffice.³ Thus, misrepresentations made by corporate officers at public meetings do not bind the company unless they were made by its express authority.⁴ And the subscriber is affected with knowledge that commissioners appointed by law to receive subscriptions are not agents of the company and have no authority to make representations binding upon it.⁵ The corporation is liable for the fraud of its agents in procuring subscriptions to the extent that it has been benefited thereby, and it cannot be allowed to

retain the benefit without assuming the burden of the representations by which the subscription was induced.⁶

1 *Cunningham v. Edgefield etc. R. R. Co.* 2 Head, 23; *Penobscot R. R. Co. v. White*, 41 Me. 512; 66 Am. Dec. 257; *Goodrich v. Reynolds*, 31 Ill. 430; 83 Am. Dec. 240.

2 *Crump v. United States Mining Co.* 7 Gratt. 353; 56 Am. Dec. 116; *Rives v. Montgomery etc. Plank Road Co.* 30 Ala. 92; *Ft. Wayne etc. R. R. Co. v. Deane*, 10 Ind. 533; *Goodrich v. Reynolds*, 31 Ill. 490; 83 Am. Dec. 240; *Penobscot R. R. Co. v. White*, 41 Me. 512; 63 Am. Dec. 257; *Wood's Railway Law*, § 46.

3 *Penobscot R. R. Co. v. White*, 41 Me. 512; 66 Am. Dec. 257; *Goodrich v. Reynolds*, 31 Ill. 490.

4 *Buffalo etc. R. R. Co. v. Dudley*, 14 N. Y. 336; *Vicksburg etc. R. R. Co. v. McKean*, 13 La. An. 638; *Smith v. Tallahassee etc. R. R. Co.* 30 Ala. 650; *First National Bank v. Hurford*, 29 Iowa, 5. 9. *Contra, McClellan v. Scott*, 24 Wis. 81; *Atlanta etc. R. R. Co. v. Hodnett*, 33 Ga. 669.

5 *Wight v. Shelby R. R. Co.* 16 Mon. B. 4; 64 Am. Dec. 522; *Barington v. Pittsburgh etc. R. R. Co.* 34 Pa. St. 358.

6 *Montgomery etc. R'y Co. v. Matthews*, 77 Ala. 357. See also *Anderson v. Newcastle etc. R. R. Co.* 12 Ind. 376; 74 Am. Dec. 218.

§ 133. Of misrepresentations contained in prospectuses and reports.—Where the prospectus contains misrepresentations or suppression of the truth with respect to existing facts, and it is reasonable to believe that had the truth been known to the subscriber he would not have entered into the contract, it will be held to amount to such fraud as will release him from his agreement.¹ The company is likewise responsible and liable for misrepresentations contained in the reports of its officers to the stockholders. It cannot say that such reports were intended for stockholders alone. The law holds that the report is known and intended to be known to all who contemplate becoming stockholders.² The representations of a prospectus, however, are to be taken with some allowance “for the sanguine expectations of the promoters of the adventure; and no prudent man will accept the prospects which are

always held out by the originators of every new scheme, without considerable abatement." ³

1 Atlanta etc. R. R. Co. v. Hodnett, 33 Ga. 669; Pulsford v. Richards, 17 Jur. 835; Oakes v. Turquand, Law R. 2 H. L. App. C. 325; Central R'y Co. v. Kisch, Law R. 2 H. L. App. C. 99; Heyman v. European etc. R'y Co. Law R. 7 Eq. 154; Hallows v. Fernie, Law R. 3 Eq. 523; Blake's Case, 14 Beav. 639.

2 New Brunswick etc. R'y Co. v. Conybeare, 9 H. L. Cas 711; National Exchange Co. v. Drew, 33 Eng. L. & Eq. 1; Cook on Stock & Stockh. § 1.4.

3 Directors etc. of Central R'y Co. v. Kisch, Law R. 2 H. L. App. C. 99.

§ 134. **Fraud by suppressions of truth, and by statement of what is not known to be true** — Fraudulent misrepresentations may be made either by an express statement of what is not true, or by a partial suppression of the truth; for the suppression of a material fact may often amount to a fraud,¹ giving "to the truth which is told the character of falsehood."² Again a fraudulent misrepresentation may consist as well of a statement with respect to an existing fact which is not *known* to be true as of a statement of what is known *not* to be true.³ Where, however, there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission, unless it is such as to show that there is a complete difference in substance between what were supposed to be, and what were the facts, "so as to constitute a failure of consideration."⁴ And many of the American cases hold it necessary to show a fraudulent purpose, or that the agent knew that the statements were untrue;⁵ or that, if the falsity of the representations were not actually known to him, yet that his position was such as to make it his duty to know the truth.⁶

1 Directors etc. of Central R'y Co. v. Kisch, Law R. 2 H. L. App. C. 99.

2 Oakes v. Turquand, Law R. 2 H. L. App. C. 325; New Brunswick etc. R'y Co. v. Muggeridge, 1 Drew. & S. 363, 391; Heyman v. European Central R'y Co. Law R. 7 Eq. 154. Cf. Pulsford v. Richards, 17 Beav. 87.

3 *Edgington v. Fitzmaurice*, 29 Ch. Div. 459; *Reese River Co. v. Smith*, Law R. 4 H. L. Cas. 64, affirming S. C. Law R. 2 Eq. 264; *Henderson v. Railroad Co.* 17 Tex. 560; 67 Am. Dec. 675.

4 *Kennedy v. Panama etc. Co.* Law R. 2 Q. B. 580.

5 *Selma etc. R. R. Co. v. Anderson*, 51 Miss. 829; *Cunningham v. Edgefield etc. R. R. Co.* 2 Head, 23; *Nugent v. Cincinnati etc. R. R. Co.* 2 Disney, 302; *Story on Agency*, §§ 127, 135, 137, 452; *Chitty on Contracts*, § 682.

6 *Selma etc. R. R. Co. v. Anderson*, 51 Miss. 829; *Waldo v. Chicago etc. R. R. Co.* 14 Wis. 575.

§ 135. **Of misrepresentation with respect to matters equally known to the subscriber and the corporate agent.**—"Every contracting person has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party, and unknown to him, as a basis of a mutual engagement, and he is under no obligation to investigate and verify statements, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith."¹ But misrepresentations with respect to matters of which the subscriber has the means of knowing the truth as well as the corporate agent are not considered, ordinarily, competent evidence in support of an allegation of fraud. Thus representations inconsistent with the terms of the subscription paper cannot be shown in support of an allegation of fraud,² where the subscriber has had an opportunity to read the contract.³ So also in a recent case it has been held, that a fraudulent misrepresentation that certain of the subscriber's neighbors and friends had agreed to take stock, he having opportunity to ascertain the falsity of the assertion, will not release him from his contract.⁴

1 *Mead v. Bunn*, 32 N. Y. 274; *Upton v. Egglehart*, 3 Dill. 496; *Kisch v. Central R'y Co.* Law R. 2 H. L. App. C. 99; *New Brunswick etc. R'y Co.* 1 Drew. & S. 363.

2 *Blodgett v. Morrill*, 20 Vt. 509; *Connecticut etc. R. R. Co. v. Bailey*, 21 Vt. 465; 58 Am. Dec. 181; *Johnson v. Crawfordville R. R. Co.* 11 Ind. 280.

3 *Thornburg v. Newcastle etc. R. R. Co.* 14 Ind. 499.

4 *Haskell v. Worthington* (1888), 94 Mo. 560.

§ 136. **Of statements of opinion.**—The expression of an erroneous opinion is not necessarily equivalent to a fraudulent misrepresentation.¹ Thus, representations as to the probable cost and profit of the road,² the value of a federal grant,³ the ability of the company to complete the road within a certain time,⁴ and declarations of an agent as to the route of the road,⁵ have been held to be mere expressions of opinion, and as such not to release the subscriber, nor bind the company, unless the agent made them with intent to deceive, and with full knowledge of their falsity.⁶ And as statements with regard to the future, the prospects and anticipated value of the enterprise,⁷ and representations as to what the corporation *will* do,⁸ must necessarily be merely a matter of opinion, they do not ordinarily constitute a ground for the rescission of contracts of subscription.⁹ If, however, the opinion is falsely expressed with intent to deceive, the contract thereby procured will be void, unless the representation relates to a matter equally open to both parties.¹⁰

1 *Montgomery Southern R'y Co. v. Matthews*, 77 Ala. 357; 54 Am. Rep. 67; *Selma etc. R. R. Co. v. Anderson*, 51 Miss. 829; *Sanger v. Upton*, 91 U. S. 56; *Upton v. Hansbrough*, 3 Biss. C. C. 417; *Tuckerman v. Brown*, 33 N. Y. 297; 18 Am. Dec. 386; *Syracuse etc. R. R. Co. v. Gere*, 4 Hun, 392; *Greenville etc. R. R. Co. v. Smith*, 6 Rich. 91; *Ellison v. Mobile etc. R. R. Co.* 35 Miss. 272; *Walker v. Mobile etc. R. R. Co.* 34 Miss. 245; *Vicksburg etc. R. R. Co. v. McKean*, 12 La. An. 638; *Wight v. Selby R. R. Co.* 16 Mon. B. 4; 63 Am. Dec. 522; *Swartara R. R. Co. v. Brune*, 6 Gill, 41; *White Mountain etc. R. R. Co. v. Eastman*, 34 N. H. 124; *McRae v. Atlantic etc. R. R. Co.* 5 Jones Eq. 395; *Dill v. Wabash Valley R. R. Co.* 21 Ill. 91; *Oregon Central R. R. Co. v. Scoggin*, 3 Or. 161; *McAllister v. Indianapolis etc. R. R. Co.* 15 Ind. 11; *Miller v. Wildcat Gravel Road*, 17 Ind. 241; *Jewett v. Valley R. R. Co.* 34 Ohio St. 601; *Henry v. Vermilion etc. R. R. Co.* 17 Ohio, 87; *Milwaukee etc. R. R. Co. v. Field*, 12 Wis. 378; *Johnson v. Pensacola etc. R. R. Co.* 9 Fla. 299; *Martin v. Pensacola etc. R. R. Co.*

8 Fla. 370; 73 Am. Dec. 713; *McCarthy v. Selinsgrove etc. R. R. Co.* 87 Pa. St. 332; *Cass v. Pitsburgh etc. R. R. Co.* 80 Pa. St. 31; *Piscataqua Ferry Co. v. Jones*, 39 N. H. 431; *Corwith v. Culver*, 69 Ill. 502; *Cincinnati etc. R. R. Co. v. Pearce*, 28 Ind. 502; *Brownlee v. Ohio etc. R. R. Co.* 18 Ind. 68; *Thornburgh v. Newcastle etc. R. R. Co.* 14 Ind. 499; *Bish v. Bradford*, 17 Ind. 490; *Andrews v. Ohio etc. R. R. Co.* 11 Ind. 169.

2 *Ogilvie v. Knox Insurance Co.* 22 How. 380; *Walker v. Mobile etc. R. R. Co.* 34 Miss. 245; *Andrews v. Ohio etc. R. R. Co.* 14 Ind. 169.

3 *Walker v. Mobile etc. R. R. Co.* 34 Miss. 245.

4 *Montgomery Southern R'y Co. v. Matthews*, 77 Ala. 357; 54 Am. Rep. 60; *Parker v. Thomas*, 19 Ind. 213; 81 Am. Dec. 385; *Brownlee v. Ohio etc. R. R. Co.* 18 Ind. 68; *Bish v. Bradford*, 17 Ind. 490; *Hardy v. Merriweather*, 14 Ind. 203.

5 *Montgomery Southern R'y Co. v. Matthews*, 77 Ala. 357; 51 Am. Rep. 60; *Mississippi etc. R. R. Co. v. Cross*, 20 Ark. 443.

6 *Montgomery Southern R'y Co. v. Matthews*, 77 Ala. 357; 51 Am. Rep. 61.

7 *Salem Mill Dam Corporation v. Ropes*, 9 Pick. 187; 19 Am. Dec. 363; *Hardy v. Merriweather*, 14 Ind. 203; *Vawter v. Ohio etc. R. R. Co.* 14 Ind. 174.

8 *Mississippi etc. R. R. Co. v. Cross*, 20 Ark. 443; *Fakright v. Logansport etc. R. R. Co.* 13 Ind. 477; *Evansville etc. R. R. Co. v. Posey*, 13 Ind. 363; *Johnson v. Crawfordsville etc. R. R. Co.* 11 Ind. 280; *Four Mile Valley R. R. Co. v. Bailey*, 18 Ohio St. 280. But see *Atlantic etc. R. R. Co. v. Hodnett*, 36 Ga. 669; *Vicksburg etc. R. R. Co. v. McKean*, 12 La. An. 538; *Martin v. Pensacola etc. R. R. Co.* 8 Fla. 376; 73 Am. Dec. 713; *Mississippi etc. R. R. Co. v. Cross*, 20 Ark. 443.

9 See cases cited *supra*.

10 *Montgomery Southern R'y Co. v. Matthews*, 77 Ala. 357; 54 Am. Rep. 60; *Cook on Stock & Stockh.* § 145.

§ 137. Of misrepresentation with respect to matters of law.—On the same principle, misrepresentations with respect to matters of law are not competent evidence in support of an allegation of fraud; for all men are presumed to know the law. Accordingly, misrepresentations as the extent of liability on stock, and the legal effect of the contract, do not release the subscriber.¹ And misrepresentations by the agents of the company that the shares will not be assessed beyond a certain percentage, less than their face value, will not enable the holder to evade liability upon the full par value when he has failed to use due diligence to ascertain the correctness of the representations.² But a sub-

scriber is not affected with knowledge of the law of a foreign State.³

1 *Upton v. Tribilcock*, 91 U. S. 45; *Thornburgh v. Newcastle etc. R. R. Co.* 14 Ind. 499; *Olem v. Newcastle etc. R. R. Co.* 9 Ind. 488; 68 Am. Dec. 653; *Parker v. Thomas*, 19 Ind. 213; 81 Am. Dec. 385. Cf. *North Eastern R. R. Co. v. Rodriguez*, 10 Rich. 278, where the representation was that the subscriber might allow forfeiture; *Olem v. Newcastle etc. R. R. Co.* 9 Ind. 488, where the representation was that payment would not be demanded until completion of construction.

2 *Upton v. Tribilcock*, 91 U. S. 45; *Hall v. Selma etc. R. R. Co.* 6 Ala. 741.

3 *Upton v. Englehart*, 3 Dill. 496.

§ 138. The misrepresentation must be shown to be material.—Misrepresentations with respect to any fact, past or present, materially affecting the status of the company and thereby inducing the subscriber to conclude the contract, will constitute such fraud as will release the subscriber from his liability thereon.¹ Thus, where the agent represented that the railway was earning four and a half per cent. on the amount invested, well knowing that the company was on the verge of bankruptcy, it was held to be sufficient ground for the rescission of subscriptions thereby induced.² So also, misrepresentations as to the nature of the business,³ misrepresentations to the effect that the work of construction has reached a certain stage of completion;⁴ that the company is solvent and prosperous;⁵ that its property is unencumbered;⁶ that certain persons are directors,⁷ and that the directors have taken stock in the company,⁸ have been held to be material and good by way of defense. But fraudulent representations which do not result in damage to the subscriber are not sufficient to enable him to obtain a release.⁹ As, for example, a false statement as to the amount of stock that has been sub-

scribed is not ordinarily a material misrepresentation;¹⁰ although the contrary has been held.¹¹

1 *Montgomery etc. R'y Co. v. Matthews*, 77 Ala. 357; 54 Am. Rep. 60; *Wickham v. Grant*, 28 Kan. 517; and cases cited *passim*. See, also, *Cook on Stock & Stockh.* § 145, where this subject is ably treated.

2 *Waldo v. Chicago etc. R. R. Co.* 14 Wis. 575.

3 *West v. Crawfordsville etc. Co.* 19 Ind. 242; *Blackburn's Case*; 3 Drew, 409.

4 *Peel's Case*, Law R. 2 Ch. App. 674.

5 *Melendy v. Keen*, 89 Ill. 395; *Bell's Case*, 22 Beav. 35. But see *Jackson v. Turquand*, Law R. 4 H. L. Cas. 305.

6 *McClellan v. Scott*, 24 Wis. 81.

7 *Blake's Case*, 34 Beav. 639.

8 *Henderson v. Lacon*, Law R. 5 Eq. Cas. 249.

9 *Cunningham v. Edgefield etc. R. R. Co.* 2 Head, 23; *Keller v. Johnson*, 41 Ind. 337; 31 Am. Dec. 355. *Cf.* *Hays v. Ottawa etc. R. R. Co.* 61 Ill. 422.

10 *Parker v. Thomas*, 19 Ind. 213; 87 Am. Dec. 385; *Brownlee v. Ohio etc. R. R. Co.* 18 Ind. 68; *Bish v. Bradford*, 17 Ind. 490; *Hardy v. Merriweather*, 14 Ind. 203; *Goodrich v. Reynolds*, 31 Ill. 490; 83 Am. Dec. 420.

11 *Ross v. Estates Investments Co.* Law R. 3 Ch. 682.

§ 139. **Set-off and counterclaim in actions to enforce subscriptions.**—Set-offs and counterclaims cannot be plead in an action to enforce subscription where the corporation is insolvent,¹ the subscriber's remedy being to file his claim among those of the other creditors;² for there is no reason why a creditor should be in any better situation on account of being at the same time a stockholder. As a creditor, he is entitled only to his *pro rata* with the other creditors.³ But when the corporation is solvent, a subscriber may avail himself of a set-off or counterclaim.⁴ And when the corporation has in good faith allowed a set-off in a settlement with a subscriber, the transaction cannot be questioned upon the subsequent insolvency of the company.⁵ A stockholder may be absolutely discharged from all liability by payment on legal compulsion to any

creditor for whose debt he is liable, if the payment equals the amount of his stock; and "probably the same effect would result from a voluntary payment."⁹

1 *Sawyer v. Hoag*, 17 Wall. 610; *Mudford's Case*, 14 Ch. Div. 634; *Black's Case*, Law R. 8 Ch. 234; *Grissell's Case*, Law R. 1 Ch. 528. *Cf. Pallatt's Case*, 2 Ch. 527.

2 *Grissell's Case*, Law R. 1 Ch. 528.

3 *In re Empire City Bank*, 18 N. Y. 199, 227.

4 *Barnett's Case*, Law R. 10 Eq. 449.

5 *Goodwin v. McGehee*, 15 Ala. 232. *Cf. Paine v. Central Vermont R. Co.* 113 U. S. 152.

6 *Garrison v. Howe*, 17 N. Y. 438; *Agate v. Sands*, 73 N. Y. 620; *Sackett's Harbor R. R. Co. v. Blake*, 3 Rich. Eq. 225.

§ 140. **Abandonment, delay and failure of the corporate enterprise.**—A subscription to the capital stock of a railway company will be held extinguished upon the abandonment of the road by the company.¹ Thus a failure to begin work for a term of nine years,² or a failure to make calls before the statute of limitations has barred the contract of subscription,³ will, unless satisfactorily accounted for, warrant the subscribers to consider the enterprise permanently abandoned.⁴ But mere delay in the completion of the corporate enterprise,⁵ or a statutory extension of the time allowed in the charter for building the road,⁶ or a misuser or non-user of the franchises,⁷ or the fact that the corporation has been ousted from its franchises;⁸ or temporary abandonment of the work,⁹ or even permanent abandonment of a part of the original plan, will not release the subscriber.¹⁰ For a subscriber is not released by slight variations between the undertaking authorized in the act of incorporation and the original plan contemplated.¹¹ And when the articles of agreement authorize the directors to vary or abandon any part of the under-

taking, the subscriber will not be released from liability by an alteration of the scheme.¹² Abandonment cannot be urged as a defense as against the claims of the creditors of an insolvent corporation.¹³ Nor, of course, can abandonment on account of failure of the enterprise and insolvency constitute a defense;¹⁴ nor can a subscriber plead that the property of the company has been seized by the State under execution.¹⁵ An action to enforce the payment of a subscription is not abated by the appointment of a receiver. It may be continued by the receiver in the name of the corporation.¹⁶

1 Delaware River etc. R. R. Co. v. Rowland, 9 Atl. Rep. 929.

2 Fountain Ferry T. R. Co. v. Jewell, 8 Mon. B. 147.

3 Pittsburgh etc. R. R. Co. v. Byers, 32 Pa. St. 22; 72 Am. Dec. 770.

4 McCully v. Pittsburgh etc. R. R. Co. 32 Pa. St. 25.

5 Miller v. Pittsburgh etc. R. R. Co. 40 Pa. St. 237; 80 Am. Dec. 570.

6 Jacks v. Helena, 41 Ark. 213.

7 Hammett v. Little Rock etc. R. R. Co. 20 Ark. 204; Ouchita etc. R. R. Co. v. Cross, 20 Ark. 443; Mississippi etc. R. R. Co. v. Cross, 20 Ark. 443.

8 Rowland v. Meader etc. Co. 33 Ohio St. 263.

9 McMillan v. Maysville etc. R. R. Co. 15 Mon. B. 218; 61 Am. Dec. 181.

10 Buffalo etc. R. R. Co. v. Gifford, 87 N. Y. 294; S. C. 22 Hun, 359; Dorman v. Jacksonville etc. R. R. Co. 7 Fla. 265.

11 Great Western R'y Co. v. Gordon, 16 Mees. & W. 805, where the original plan was to construct a railway from A. to B. via C., but the charter authorized a railway only from A. to B., substituting the purchase of a canal from B. to C.

12 Nixon v. Brownlow, 2 Hurl. & N. 452; S. C. 26 Law J. Ex. 273; 27 Law J. Ex. 509.

13 Phoenix Warehousing Co. v. Badger, 67 N. Y. 294; Smith v. Gower, 2 Duval, 17; Hardy v. Merriweather, 14 Ind. 203; Cook on Stock & Stockh. § 139.

14 Four Mile etc. R. R. Co. v. Bailey, 18 Ohio St. 208; Morgan County v. Thomas, 76 Ill. 120, 141; Hardy v. Merriweather, 14 Ind. 233.

15 Mullins v. North etc. R. R. Co. 54 Ga. 580.

16 Tracy v. First National Bank, 37 N. Y. 523; Albany etc. Insurance Co. v. Van Vracken, 42 How. Pr. 281; Phoenix Warehousing Co. v. Badger, 6 Hun, 297.

§ 141. **The statute of limitations.**—The statute of limitations does not begin to run on subscrip-

tions until a call has been made and is due.¹ Whether equity will follow the law in applying the statute to subscriptions for stock is doubtful—certainly not when it would “have a manifestly inequitable and unjust operation.”² A subscriber who has availed himself of the statute even as to a part of his subscription cannot without payment claim a certificate of stock; for the statute of limitations, although it bars the remedy, does not pay the debt.³ When the statute of limitations has barred the corporation, the creditors are likewise barred from enforcing payment of subscription.⁴

1 *Hawkins v. Glenn*, 131 U. S. 319; *Western R. R. Co. v. Avery*, 64 N. C. 439; *Curry v. Woodward*, 53 Ala. 376; *Taggart v. Western Maryland R. R. Co.* 24 Md. 563; 89 Am. Dec. 760. *Cf.* *Appeal of Mack* (Pa. 1886), 7 Atl. Rep. 481.

2 *Terry v. Bank of Cape Fear*, 20 Fed. Rep. 777; *Schoville v. Thayer*, 105 U. S. 113, 155. In *Payne v. Bullard*, 23 Miss. 83, 55 Am. Dec. 74, the statute was declared to have no application in equitable actions to enforce payment of subscriptions; so also in *Hightower v. Thornton*, 3 Ga. 486, 52 Am. Dec. 412; but *contra* in *Bank of the United States v. Dallam*, 4 Dana, 574.

3 *Johnson v. Albany etc. R. R. Co.* 54 N. Y. 416, 426; 13 Am. Rep. 607; *Cook on Stock & Stockh. etc.* § 195; *Hawkins v. Glenn*, 131 U. S. 319.

4 *Stephen v. Ware*, 45 Cal. 110; *Thompson v. Reno Savings Bank* (1885), 19 Nev. 103, and note, pp. 803-373; *Cook on Stock & Stockh.* § 195.

§ 142. **Miscellaneous defenses to actions to enforce subscriptions.**—A subscriber cannot avoid liability by reason of the failure of the agent to deliver the original subscription paper to the company;¹ nor by pleading that other subscribers were allowed to obtain shares upon more favorable terms,² or that other subscribers paid in money of the Confederate States,³ or that a creditor who is enforcing payment is a director also of the corporation,⁴ or that an illegal by-law prohibits his voting until payment of calls,⁵ or that more than the capital stock has been subscribed;⁶ nor, it has been

said, by pleading that the charter required the whole capital stock to be paid in before beginning business and that the requirement was disregarded.⁷ Neither does a release in bankruptcy relieve the bankrupt from payment of subsequent calls.⁸

1 Pickering v. Templeton, 2 Mo. App. 424.

2 Anderson v. Newcastle etc. R. R. Co. 12 Ind. 376; 74 Am. Dec. 218.

3 Macon etc. R. R. Co. v. Vason, 57 Ga. 314.

4 Chouteau Insurance Co. v. Floyd, 74 Mo. 286.

5 Chandler v. Northern Cross R. R. Co. 18 Ill. 190; New Albany etc. R. R. Co. v. McCormick, 10 Ind. 499; 71 Am. Dec. 337.

6 Oler v. Baltimore etc. R. R. Co. 41 Md. 583.

7 McDermott v. Dongan, 41 Mo. 85. But to the contrary see § 195 *supra*, where it is shown that every subscription is made upon the implied condition precedent that the whole specified capital stock shall be taken, unless otherwise expressly provided by the charter.

8 Glenn v. Howard (1886), 65 Md. 40.

§ 143. Waiver, acquiescence and delay a bar to the subscriber's remedy.—Any defense to a contract of subscription may be waived by an act indicating a clear intent to abide by the contract or pass over an objection thereto which might have been made;¹ as for example, by payment of calls with a knowledge of the existence of the defense;² by accepting the shares of stock,³ by accepting dividends,⁴ by paying for one share,⁵ or by transferring others,⁶ by attending corporate meetings,⁷ by participating in an election,⁸ by voting by proxy,⁹ by acting as a director,¹⁰ by acquiescence or delay after the discovery of the real facts,¹¹ or in general, by exercising any of the rights or enjoying any of the benefits of a shareholder.¹²

1 City Bank v. Bartlett, 71 Ga. 797; May v. Memphis Branch R. R. Co. 43 Ga. 100; McCully v. Pittsburgh etc. R. R. Co. 32 Pa. St. 25; Chubb v. Upton, 95 U. S. 645; Ogilvie v. Knox Insurance Co. 23 Hun, 38; Chaffin v. Cummings, 57 Me. 76; Ex parte Briggs, Law R. 1 Eq. Cas. 486; Scholey v. R'y Co. Law R. 9 Eq. 263, n; Ayres' Case, 25 Beav. 513; Cook on Stock, § 198. But see Stewart's Case, Law R. 1 Ch. App. 574, where attending meeting, and Philadelphia R. R. Co. v. Cowell, 23 Pa.

St. 329; 70 Am. Dec. 128, where demanding a dividend, and Greenville etc. R. R. Co. v. Colman, 5 Rich. 118, and McCully v. Pittsburgh etc. R. R. Co. 32 Pa. St. 25, where voting by proxy, were not considered acts sufficient to amount to a waiver.

2 Mississippi etc. R. R. Co. v. Harris, 36 Miss. 17; Maltby v. Northwestern etc. R. R. Co. 16 Md. 422; Inter-Mountain Publishing Co. v. Jack, 5 Mont. 568.

3 Inter-Mountain etc. Co. v. Jack, 5 Mont. 568.

4 Duffield v. Barnum etc. Co. (1887) 64 Mich. 293. *Contra*; Philadelphia etc. R. R. Co. v. Cowell, 28 Pa. St. 329, 70 Am. Dec. 128, where demanding a dividend was not considered a waiver.

5 Bell's Appeal (1887,) 115 Pa. St. 88.

6 Bell's Appeal (1887), 115 Pa. St. 88.

7 Duffield v. Barnum etc. Co. (1887), 64 Mich. 293. *Contra*, Stewart's Case, Law R. 1 Ch. App. 574.

8 Rockville etc. Co. v. Van Ness, 2 Cranch C. C. 449.

9 Duffield v. Barnum etc. R. R. Co. (1887), 64 Mich. 293. *Contra*, McCully v. Pittsburgh etc. R. R. Co. 32 Pa. St. 25.

10 Weinman v. Wilksburgh etc. R'y Co. (1888) 118 Pa. St. 192; Rice v. Rock Island etc. R. R. Co. 21 Ill. 93; Hunt v. Kansas etc. Co. 11 Kan. 412; Meadow v. Gray, 30 Me. 547.

11 Schwanck v. Morris, 7 Rob. (N. Y.) 659; State v. Jefferson Turnpike Co. 3 Humph. 305; City Bank v. Bartlett, 71 Ga. 797; Peel's Case, Law R. 2 Ch. App. 674; Ashley's Case, Law R. 9 Eq. Cas. 263; Heyman v. European Central R'y Co. Law R. 7 Eq. Cas. 154; Sharpley v. South etc. R'y Co. 2 Ch. Div. 663; Erlanger v. Sombrero etc. Co. Law R. 3 App. 1218.

12 City Bank v. Bartlett, 71 Ga. 797.

§ 144. **Corporate insolvency a bar to every remedy.**—Corporate insolvency bars every remedy. The equities of the corporate creditor then become superior to those of the subscriber, even when his subscription has been induced by fraud. While ordinarily the law does not readily presume acquiescence or waiver in the case of subscriptions procured through fraud, nor hasten to impute laches to subscribers so deceived by the corporate agents, yet when the corporation has become insolvent, a contract of subscription procured through fraud cannot be rescinded to the prejudice of the rights of creditors.¹ And when the subscriber has waited until suit has been brought by a receiver, it is then too late for him to plead fraudulent misrepresenta-

tion,² although the fraud was not discovered until after insolvency.³ Even impending insolvency, before an actual assignment or appointment of a receiver, may bar the subscriber's remedy.⁴ But if proceedings have been commenced by a shareholder before the company has become insolvent, his remedy will not be destroyed by a subsequent winding-up order.⁵

1 *Chubb v. Upton*, 95 U. S. 665, 667; *Upton v. Tribilcock*, 91 U. S. 45; *Webster v. Upton*, 91 U. S. 65; *Sanger v. Upton*, 91 U. S. 56; *Farrar v. Walker*, 13 Nat. Bank. Reg. 82; *Michener v. Payson*, 13 Nat. Bank. Reg. 49; *Ogilvie v. Knox Insurance Co.* 22 Hun, 380; *Ruggles v. Brock*, 6 Hun, 164; *Tennent v. City of Glasgow Bank*, Law R. 4 H. L. App. C. 615; *Burgess's Case*, 15 Ch. 507; *Oakes v. Turquand*, Law R. 2 H. L. App. Cas. 325; *Wright's Case*, Law R. 12 Eq. Cas. 331; *Clarke v. Dickson*, 27 Law J. Q. B. 223; *Collins v. Collins*, 3 Com. P. Div. 282; *Mixer's Case*, 4 De Gex & J. 575; *Duffield v. Barnum etc. Co.* (1887), 64 Mich. 293.

2 *Upton v. Tribilcock*, 91 U. S. 45; *Ruggles v. Brock*, 6 Hun, 164.

3 *Turner v. Grangers' etc. Insurance Co.* 65 Ga. 649; 38 Am. Rep. 801.

4 *Oakes v. Turquand*, Law R. 2 H. L. 325; *Stone v. City & County Bank*, 3 Com. P. Div. 283; *Steel's Case*, 28 Week. R. 241; *Tennent v. City of Glasgow Bank*, 4 App. Cas. 615.

5 *Rees Silver Mining Co. v. Smith*, Law R. 6 H. L. 64; *Henderson v. Lacon*, 6 Eq. 249.

CHAPTER VII.

CALLS AND ASSESSMENTS.

- § 145. Definitions and general considerations.
- § 146. Assessments of fully paid shares.
- § 147. Of voluntary payments before a call has been made.
- § 148. Of calls—The English and New York statutes.
- § 149. No formalities requisite to validity of calls.
- § 150. A call is generally necessary to render the obligation to pay absolute.
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- § 152. A call unnecessary in case of corporate insolvency.
- § 153. A call must be impartial and uniform.
- § 154. Stockholders cannot question the necessity for making a call.
- § 155. The authority to make calls—In whom vested.
- § 156. Calls by directors—Requisites of validity.
- § 157. The authority to make calls—To what extent it may be delegated to others.
- § 158. Uncalled subscriptions are not assignable nor subject to mortgage.
- § 159. Of the amount and time of making calls.
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- § 161. Of calls payable in installments.
- § 162. Notice of calls—Whether a condition precedent to action to enforce payment.
- § 163. Notice of calls must be actual, not constructive.
- § 164. Notice of calls by publication.
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- § 167. Liability to pay calls—How proven.
- § 168. Of interest on calls.
- § 169. Demand—Waiver.
- § 170. Pleading—Measure of damages—Limitation.

§ 145. Definitions and general considerations. The word call is capable of three meanings. It may mean either the resolution by the corporate

authorities that payment be made upon the subscriptions, or the notification of the subscribers, or it may be used to refer to the time when payment becomes due.¹ Accordingly, we find the word variously defined. It has been said to be an official declaration by the proper corporate authorities that a specified part or the whole of the amount due upon the subscriptions to the capital stock is required to be paid.² A call has also been defined as an application to each shareholder for a proportion of the amount due upon his shares;³ and again, as a direction by the directors to the president of the company to collect the subscriptions.⁴ When the number of shares has not been fixed by charter, no call or assessment can be made until the number has been determined by the directors.⁵ Calls cannot be validly made for any but a legal object.⁶ Stock subscribed for after a call has been made is not subject thereto.⁷ An agreement to set-off calls due a shareholder against goods supplied by him would seem to be *ultra vires*.⁸ The directors cannot legally postpone making a call to give themselves an opportunity to escape liability by disposing of the stock held by them.⁹ A contract by which the corporation binds itself to postpone making calls indefinitely is void.¹⁰

1 *Ambergate etc. R'y Co. v. Mitchell*, 4 Wels. H. & G. 540.

2 *Braddock v. Philadelphia etc. R. R. Co.* 45 N. J. 363. *Cf.* *Sprangler v. Indiana etc. R. R. Co.* 21 Ill. 276.

3 *Newry etc. R'y Co. v. Edmunds*, 2 Ex. 118.

4 *Braddock v. Philadelphia etc. R. R. Co.* 45 N. J. 363.

5 *Somerset etc. R. R. Co. v. Cushing*, 45 Me. 524; *Worcester etc. R. R. Co. v. Hands*, 8 Cush. 110; *Cabot etc. Bridge v. Chapin*, 6 Cush. 50; *Troy etc. R. R. Co. v. Newton*, 8 Gray, 596.

6 *South Eastern R'y Co. v. Hebblethwaite*, 12 Ad. & E. 497.

7 *Pike v. Shore Line*, 68 Me. 445.

8 *Pellatt's Case*, 2 Ch. 527.

9 *Gilbert's Case*, Law R. — Ch. 550; *Preston v. Great Collier Dock Co.* 11 Sim. 327.

10 *Van Allen v. Illinois Central R. R. Co.* 7 Bosw. 515; *McComb v. Credit Mobilier etc. Co.* 13 Phila. 463.

§ 146. **Assessments of fully paid shares.**—The word “assessment” is often used as synonymous with “call,” and is used also to designate demands upon subscribers for payments of money over and above the par value of their shares.¹ Thus, a statute by which a corporation is empowered to “assess upon each share of stock such sums of money as the corporation may think proper, not exceeding in the whole the amount at which each share was originally limited,” has been held to warrant an assessment on stock, of which the subscriber had already paid in the full par value.² Under the California code, corporations organized and existing under the laws of the State have power to levy and collect assessments for the purposes of the corporation on shares of stock, the subscriptions upon which have been paid in full.³ But without statutory authority, the company cannot assess the stock beyond its full par value.⁴ When stock is issued as “non-assessable,” it cannot be assessed beyond the full par value; but these words do not exempt the holder from the payment of calls until the full face value has been paid.⁵ Where the charter provided that “no assessment shall be laid upon any share of a greater amount than one hundred dollars in the whole,” it was held that the charter limited the aggregate amount of all the assessments to one hundred dollars.⁶

1 *Cook on Stock & Stockh. etc.* § 104.

2 *Price's Appeal*, 106 Pa. St. 421; Pa. Act of April 29, 1874. And a like

construction is put upon the phrase "liable to the amount of his stock." *McDonnell v. Alabama Gold Life Ins. Co. S. O. (Ala. 1885)*, construing Ala. Const. art. 13, §§ 2, 3, and Ala. Code of 1867, § 1760.

3 *Santa Cruz R. R. Co. v. Spreckles*, 65 Cal. 193; Cal. Civ. Code, §§ 331-323.

4 *Beach v. Smith*, 30 N. Y. 116; *American Silk Works v. Salomon*, 4 Hun, 135; *Spens v. Iowa etc. Co.* 36 Iowa, 407; *Ohio etc. R. R. Co. v. Cramer*, 23 Ind. 490; *Santa Cruz etc. R. R. Co. v. Spreckles*, 65 Cal. 193; *Cincinnati etc. R. R. Co. v. Clarkson*, 7 Ind. 595. See further, *Santa Cruz R. R. v. Spreckles*, 65 Cal. 193; *Price's Appeal*, 106 Pa. St. 421. *Cf. Great Falls etc. R. R. Co. v. Copp*, 33 N. H. 124; *Atlantic etc. Co. v. Mason*, 5 R. I. 463; *Marborough Manuf. Co. v. Smith*, 2 Conn. 579; *Middletown etc. Turnpike Co. v. Watson*, 1 Rawle, 330.

5 *Upton v. Tribilcock*, 91 U. S. 45; *Sagory v. Dubois*, 3 Sand. Ch. 466

6 *Great Falls etc. R. R. Co. v. Copp*, 33 N. H. 124; *Lewey's Island R. Co. v. Bolton*, 48 Me. 451; 77 Am. Dec. 236.

§ 147. **Of voluntary payment before a call has been made.**—A stockholder may pay his subscription although no call has been made.¹ And by the English Companies Act of 1845, authority is conferred upon the company to allow to the subscriber interest on a payment of his subscription or any part thereof beyond the sums actually called for.² When the corporation is insolvent, money voluntarily paid by the directors upon their subscriptions, no call having been made, and immediately repaid them for fees, may be recovered by the corporate creditors.³ A debt due a subscriber from a solvent corporation may be set-off against the amount owing upon his subscription, and payment be thus effected although no call has been made;⁴ but if the corporation be insolvent, he must pay for his shares and come in with other creditors for a *pro rata* payment of his claim.⁵ A voluntary payment where no call has been made, with the understanding that if the corporate enterprise prove successful the money advanced shall be deemed a loan, but if unsuccessful, a payment for shares, will be treated

as a loan in the event of insolvency, and the subscriber held to the payment of his shares.⁶

1 *Marsh v. Burroughs*, 1 Wood, 463; *Poole's Case*, 9 Ch. Div. 322.

2 *The Companies' Clauses Act*, 1845, 8 Vict. ch. 16, § 24.

3 *Syke's Case*, Law R. 13 Eq. 255.

4 *Adamson's Case*, Law R. 18 Eq. 670.

5 *Supra*, § 139, and cases there cited.

6 *Barge's Case*, Law R. 5 Eq. 420.

§ 148. **Of calls**—**The English and New York statutes.**—With respect to the payment of subscriptions and the means of enforcing the payment of calls, it is provided by the English Companies' Clauses Act of 1845, that "the several persons who have subscribed any money toward the undertaking, or their legal representatives respectively, shall pay the sums respectively so subscribed, or such portions thereof as shall from time to time be called for by the company; and with respect to the provisions herein, or in the special act contained, for enforcing the payment of calls, the word 'shareholder' shall extend to and include the legal personal representatives of such shareholder."¹ "It shall be lawful for the company from time to time to make such calls of money upon the respective shareholders in respect of the amount of capital respectively subscribed or owing by them, as they shall think fit, provided that twenty-one days' notice at the least be given of each call, and that no call exceed the prescribed amount, if any; and that successive calls be not made at less than the prescribed interval, if any, and that the aggregate amount of calls made in any one year do not exceed the prescribed amount, if any; and every shareholder shall be liable to pay the amount of

the calls so made, in respect of the shares held by him, to the persons and at the times and places from time to time appointed by the company."² The New York General Railroad Act of 1850 provides that the directors may require the subscribers to the capital stock of the company to pay the amount by them respectively subscribed, in such manner and in such installments as they may deem proper.³

1 8 Vict. ch. 16, § 21.

2 8 Vict. ch. 16, § 22.

3 N. Y. Laws of 1850, ch. 140, § 7.

§ 149. No formalities requisite to validity of calls.—No prescribed form is requisite to the validity of a call.¹ It may be valid, notwithstanding a failure to enter the resolution in the minutes of the meeting.² Errors may be cured by a subsequent call any time before suit.³ When the call has been actually made, a shareholder "shall not wait to take advantage of any irregularity at the trial."⁴ A director who participated in making a call cannot set up informalities for the purpose of defeating it.⁵ A shareholder who has acquiesced in an informality in one call, and made payment thereof, is deemed to waive a like irregularity in another.⁶ When the name of the corporation has been legally changed, a call made in the new name is binding upon those shareholders who knew of the change.⁷

1 Fox v. Allensville etc. Turnpike Co. 46 Ind. 31; Andrew v. Ohio etc. R. R. Co. 14 Ind. 163.

2 Hays v. Pittsburgh etc. R. R. Co. 38 Pa. St. 81.

3 Philadelphia etc. R. R. Co. v. Hickman, 28 Pa. St. 318.

4 In re British Sugar Ref. Co. 3 Kay & J. 408; Richards v. Southampton Dock Co. 1 Man. & G. 448; S. C. 2 Rail. C. 215, 234.

5 *Hays v. Pittsburgh etc. R. R. Co.* 38 Pa. St. 81; *Cook on Stock & Stockh.* § 115, n.

6 *Macon etc. R. R. Co. v. Vason*, 57 Ga. 314.

7 *Shackleford v. Dangerfield*, Law R. 3 Com. P. 407.

§ 150. A call is generally necessary to render the obligation to pay absolute.—A subscription imports an agreement, not to pay at once the whole sum representing the value of the shares subscribed for, but a stipulation to pay such sum when called for by the directors in amounts duly assessed.¹ The company has no absolute right, and the shareholder is under no absolute liability to pay. The right arises only when calls are made by the directors.² Accordingly, although contract of subscription creates a debt, payment thereof is not due until a call be made,³ and no action can be maintained against a stockholder for an installment on his subscription until the board has directed the call to be made,⁴ the due making of the call by a resolution of the board of directors being an essential condition precedent.⁵ A call is necessary before the subscription can be enforced even when stock has been fraudulently issued as fully paid for property taken at an overvaluation.⁶ But where payment was to have been made in property and the subscriber having failed to convey, suit is brought for damages, it is not necessary to allege that a call has been made, an allegation of a general demand being sufficient.⁷

1 *Grosse Isle Hotel Co. v. L'Anson*, 42 N. J. 10; S. C. affirmed, 42 N. J. 442.

2 *Bank v. Abrahams*, Law R. 6 P. C. 262.

3 *Grissell's Case*, Law R. 1 Ch. 528, 535.

4 *Banet v. Alton etc. R. R. Co.* 13 Ill. 504; *Alabama etc. R. R. Co. v. Rowley*, 9 Fla. 508; *Braddock v. Philadelphia etc. R. R. Co.* 45 N. J. 363; *Sprangler v. Indiana etc. R. R. Co.* 21 Ill. 276.

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5 *Wilber v. Stockholders*, 18 Bank. Reg. 178; *Bank v. Abrahams*, Law R. 6 P. C. 262.

6 *Granite Roofing Co. v. Michael*, 54 Md. 65.

7 *Cheraw etc. R. R. Co. v. Garland*, 14 S. C. 63; *Ohio etc. R. R. Co. v. Cramer*, 23 Ind. 490.

§ 151. **The same subject continued.**—When by the contract of subscription or the charter of the company a certain time for payment is named, a call is unnecessary.¹ But when by statute or by the charter of the company it is provided that payment of subscriptions is to be in such manner and proportion and times as the directors may order, there can be no action to enforce payment until a call has been made.² This is substantially the provision of the statute in New York, to wit, that the directors may require the subscribers to pay the amount by them respectively subscribed “in such manner and in such installments as they may deem proper.”³ Yet there are expressions in certain cases decided in New York which would seem to hold that in the absence of a provision for calls in the contract of subscription, payment is due immediately upon the organization of the company, and that a call is not a condition precedent to an action for the enforcement of the subscription.⁴

1 *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294; *Brudlow v. Martinsville etc. R. R. Co.* 12 Ind. 114; *Ross v. Lafayette etc. J. R. Co.* 6 Ind. 297; *New Albany etc. R. R. Co. v. Pickens*, 5 Ind. 247; *Goodrich v. Reynolds*, 31 Ill. 490; 83 Am. Dec. 240; *Waukon etc. R. R. Co. v. Dwyer*, 49 Iowa, 121.

2 *Alabama etc. R. R. Co. v. Rowley*, 9 Fla. 508; *Grissell's Case*, Law R. 1 Ch. 528, 535.

3 N. Y. Laws of 1850, ch. 140, § 7; N. Y. Laws of 1875, ch. 108, § 8.

4 *Lake Ontario etc. R. R. Co. v. Mason*, 16 N. Y. 451, but in this case a call had been made by publication; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294, 300, but in this case the charter required payment at a certain time, and on that account a call was unnecessary. *Contra*, *Mann v. Pentz*, 3 N. Y. 415, where, in an action brought by a receiver, it was said that the only condition upon which the subscriber could have been made liable to the corporation was by regular calls made in pursuance of the charter. And see *dicta* in *Seymour v. Sturgess*, 26 N. Y. 134.

§ 152. **A call unnecessary in case of corporate insolvency.**—In case of corporate insolvency, no call is necessary. It is sufficient that a court of equity order the subscriptions to be paid.¹ “It is well settled that where stock is subscribed to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it.”² Although a writ of *mandamus* may be issued by a court of equity to compel the directors to make a call,³ yet as this “can avail only where there are directors,” and “the remedy in equity is more complete,”⁴ enforcing all the debts proportionally,⁵ the usual method is by an order of court directing an application of corporate assets to corporate debts.⁶ It has been said, however, that the filing of a creditor’s bill in equity against the corporation is equivalent to a call;⁷ and that since an assignee in bankruptcy succeeds to all the rights of the insolvent corporation, he has authority to make and to enforce payment of calls.⁸ And where a deed of assignment of an insolvent corporation provides that the unpaid subscriptions shall be payable to the assignee, the right to collect them passes thereby and may be enforced in an action brought for that purpose by a creditor.⁹ When there has been no call or assessment by the corporation, there is no obligation upon the shareholder to pay, until some order of court, or some authorized demand upon him for payment.¹⁰ Until some such authorized demand, the statute of limitations does not begin to run.¹¹

1 *Sanger v. Upton*, 91 U. S. 53; *Marsh v. Burroughs*, 1 Woods, 463; *Sagory v. Dubois*, 3 Sand. Ch. 466; *Glenn v. Williams*, 60 Md. 92; *Henry v. Vermilion etc. R. R. Co.* 17 Ohio, 187; *Hawkins v. Glenn*, (1839) 131 U.

8. 319, holding that such an order will bind stockholders of the defendant corporation, although they be not, individually, parties to the suit. *S. P. Great Western Tel. Co. v. Gray* (Ill. 1889).

2 *Scoville v. Thayer*, 105 U. S. 143; *Robinson v. Bank*, 18 Ga. 65; *Curry v. Woodward*, 53 Ala. 371; *Ward v. Griswoldville Manuf. Co.* 16 Conn. 331. See, also, *Savings Assoc. v. O'Brien*, (1899) 3 N. Y. Suppl. 764; holding that the statutory liability created by 1 Mo. Wag. Stat. ch. 37, art. 1, § 22, may be enforced by a common-law action in other States.

3 *Germantown Passenger R'y Co. v. Fitler*, 60 Pa. St. 124; *Dalton etc. R. R. Co. v. McDaniel*, 53 Ga. 191; *Hatch v. Dana*, 101 U. S. 205.

4 *Hatch v. Dana*, 101 U. S. 205.

5 *Ward v. Griswoldville Manuf. Co.* 16 Conn. 593.

6 *Cook on Stock & Stockh.* § 108, where this subject is fully treated.

7 *Hatch v. Dana*, 101 U. S. 205.

8 *Hatch v. Dana*. 101 U. S. 205.

9 *Hambleton v. Glenn*, S. C. (Va. 1889).

10 *Scoville v. Thayer*, 105 U. S. 143.

11 *Scoville v. Thayer*, 105 U. S. 143, per Wood, J.; *Van Hook v. Whitlock*, 3 Paige, 499; S. C. 26 Wend. 43; 37 Am. Dec. 216; *Nimmo v. Walker*, 14 La. Ann. 531; *Salsbury v. Black*, 6 Har. & J. 293; 14 Am. Dec. 279; *Sinkler v. Indiana etc. Turnpike Co.* 3 Pa. St. 149; *Walter v. Walter*, 1 Whart. 232; *Quigg v. Kettredge*, 18 N. H. 137. See *supra*, § 141. *Contra*, *Glenn v. Dorsheimer*, 21 Fed. Rep. 536, where it is said that the statute begins to run within a reasonable time after an assignment for the benefit of creditors. But in *Hambleton v. Glenn*, S. C. (Va. 1889), it is held that though the debts thus secured by the deed of assignment be barred by limitation, equity will aid in their enforcement.

§ 153. A call must be impartial and uniform. Calls must be impartial and uniform.¹ Any proceeding on the part of the directors by which some of the shareholders are subjected to payment of calls and others are not, will be set aside and rectified.² Thus an assessment made upon the towns and cities which had subscribed for stock in a railway company, and not on the stock held by private persons, being unauthorized by the charter, has been held to be void.³

1 *Pike v. Bangor etc. R. R. Co.* 68 Me. 445; *Preston v. Grand Dock etc. Co.* 11 Sim. 327.

2 *Preston v. Grand Dock Collier Co.* 11 Sim. 327, 346; *Cook on Stock & Stockh.* § 114.

3 *Pike v. Bangor etc. R. R. Co.* 63 Me. 445, 446.

§ 154. Stockholders cannot question the necessity for making a call.—In the absence of fraud, a

court of equity will not at the instance of a shareholder examine the affairs of a solvent company to ascertain whether, under the circumstances, it was proper in the due management of the corporate enterprise to raise money by means of calls,¹ but where there is evidence of fraud or impending corporate insolvency, the court will examine the matter, and if necessary set aside the transaction.²

1 *Chouteau Insurance Co. v. Floyd*, 74 Mo. 236, 239; *Bodd v. Multnomah Street R'y Co.* (1887) 15 Oregon, 404; 53 Am. Rep. 31; *Dalley v. Birkenhead etc. R'y Co.* 12 Beav. 433, 443; *Yetta v. Norfolk R'y Co.* 3 De Gea. & S. 23; *Judah v. The American Live Stock Association*, 4 Ind. 333.

2 *Habertson's Case*, Law R. 5 Eq. 285; *Sykes' Case*, Law R. 13 Eq. 225.

§ 155. The authority to make calls—In whom vested.—The power to make calls is generally vested in the board of directors, on the principle that the directors "may do all things except such as are to be done by the shareholders at a general meeting."¹ If the power to make assessments is by the charter vested in the directors, the stockholders have no power to make them; and if vested in the stockholders, the power cannot be exercised by the directors;² but if the statute does not make the exercise of the power by the stockholders indispensable, they may delegate their authority to the directors.³ A statute conferring the power to make calls upon "the company,"⁴ does not vest that power in a general meeting of the shareholders, but in the directors, who, without authority from the shareholders, may issue calls under the authority conferred upon "the company."⁵ When an action is brought to enforce payment of a call, proof must be given that it was made by the proper authorities.⁶

1 *Ambergate etc. R'y Co. v. Mitchell*, 4 Wels. H. & G. 540; S. C. 4 Eng. Law & Eq. 461. *Cf. Budd v. Multnomah Street R'y Co.* (1887) 15 Oregon, 404; 53 Am. Rep. 355.

2 *Middletown etc. Turnpike Co. v. Watson*, 1 Rawle, 330; *Marlborough Manuf. Co. v. Smith*, 2 Conn. 579; *Wood's Railway Law*, § 43. *Cf. Budd v. Multnomah Street R'y Co.* (1887) 15 Oregon, 404; 53 Am. Rep. 355.

3 *Rives v. Montgomery etc. Plank Road Co.* 30 Ala. 92.

4 3 Vict. ch. 16, § 22.

5 *Ambergate R'y Co. v. Mitchell*, 4 Wels. H. & G. 540; S. C. 4 Eng. L. & Eq. 461. *Contra, Ex parte Winsor*, 3 Story C. C. 425. *Cf. Haun v. Mulberry etc. Gravel Road Co.* 33 Ind. 103.

6 *New Jersey Midland R'y Co. v. Strait*, 35 N. J. 322.

§ 156. **Calls by directors—Requisites of validity.**—When calls are made by the directors it is essential to their validity that they be made by a majority,¹ at a meeting at which a quorum of the directors was present.² In America an illegal election of directors cannot be set up in resistance of the payment of calls. It is sufficient that the calls were made by directors *de facto*.³ Accordingly, an allegation that the directors were duly elected is unnecessary.⁴ In England, however, the right of the directors to their office may be questioned with respect to the validity of calls, and if they have been illegally elected, their calls and forfeitures may be set aside.⁵

1 *Hamilton v. Grand Rapids etc. R. R. Co.* 13 Ind. 347; *Price v. Grand Rapids etc. R. R. Co.* 13 Ind. 58; *Cowley v. Grand Rapids etc. R. R. Co.* 13 Ind. 61; *Pike v. Bangor etc. R. R. Co.* 68 Me. 445; *Silver Hook Road v. Greene*, 12 R. I. 164.

2 *Hamilton v. Grand Rapids etc. R. R. Co.* 13 Ind. 347; *Price v. Grand Rapids etc. R. R. Co.* 13 Ind. 58.

3 *Macon R. R. Co. v. Vason*, 57 Ga. 314; *Eakright v. Logansport etc. R. R. Co.* 13 Ill. 404; *Steinmitz v. Versailles R. R. Co.* 57 Ind. 457; *Johnson v. Crawfordsville R. R. Co.* 11 Ind. 230.

4 *Steinmitz v. Versailles etc. Turnpike Co.* 57 Ind. 457; *Miller v. Wildcat etc. Co.* 52 Ind. 51.

5 *In re Garden Gully etc. Co.* Law R. 1 App. C. 39; *Swansea Dock Co. v. Lewien*, 20 Law J. Ex. 447; *Cook on Stock & Stockh.* § 110.

§ 157. **The authority to make calls—To what extent it may be delegated to others.**—When the

authority to make calls is vested in the stockholders, and there is nothing in the terms of the charter restricting the exercise of the power to them, they may delegate their authority to the directors of the company.¹ The delegation of the authority, however, must be express. It will not be inferred from a by-law declaring that the directors "shall take care of the interests, and manage the concerns of the corporation."² When the power of making calls is vested in the directors, they cannot delegate it to others,³ although they may commission another to determine the amounts and times of payment of the installments.⁴ Thus calls made by a treasurer, under general authority conferred upon him by the board of directors, are valid, although the resolutions do not specify the amount of each call.⁵ If the directors have illegally delegated their authority, and the call has been made by another, a subsequent ratification by the directors will cure the defect.⁶

1 *Rives v. Montgomery etc. Plank Road Co.* 30 Ala. 92.

2 *Ex Parte Winsor*, 3 Story C. C. 411, 425, 426.

3 *Rutland etc. R. R. Co. v. Threll*, 35 Vt. 536; *Pike v. Shore Line*, 68 Me. 445; *Banet v. Alton etc. R. R. Co.* 13 Ill. 504.

4 *Banet v. Alton etc. R. R. Co.* 13 Ill. 504.

5 *Hays v. Pittsburgh etc. R. R. Co.* 33 Pa. St. 81.

6 *Rutland etc. R. R. Co. v. Threll*, 35 Vt. 536.

§ 158. **Uncalled subscriptions are not assignable nor subject to mortgage.**—The unpaid portion of subscriptions to stock cannot be assigned by the corporation until after it has been called;¹ otherwise the discretion with which the directors are vested to issue calls only when funds are needed for the promotion of the corporate enterprise, "would

be wholly defeated and put an end to.”² Accordingly, a mortgage of all the property and effects of the corporation does not cover uncalled subscriptions.³

1 *Hill v. Reid*, 16 Barb. 280; *Hurlbert v. Root*, 12 How. Pr. 511; *Hurlbert v. Carter*, 21 Barb. 221; *New Jersey Midland R'y Co. v. Strait*, 35 N. J. 322; *Miller v. Maloney*, 3 Men. B. 105; *Hill v. Rogers*, 50 Mich. 234; *Ex parte Stanley*, 33 Law J. Ch. 535. *Cf.* *Morris v. Cheney*, 51 Ill. 451; *Downie v. Hoover*, 12 Wis. 174; 73 Am. Dec. 739.

2 *Ex parte Stanley*, 33 Law J. Ch. 535.

3 *Pickering v. Ilfracombe R'y Co.* 37 Law J. Com. P. 118; *King v. Marshall*, 33 Beav. 565; *Lishman's Claim*, 23 Law T. Rep. N. S. 759.

§ 159. Of the amount and time of making calls.

A call may be for a part or for the whole of the amount due on subscriptions.¹ In England the special act of incorporation often prescribes the aggregate amount of calls which may be made in one year, and any call in excess of that amount is void under the Companies' Clauses Act of 1845.² If the directors rely upon the fact that a former call is void, the burden is upon them to prove it or to show that it has not been paid.³ When the charter provides that calls shall be made at certain intervals, calls made at one time are invalid.⁴ But the provision in the English Companies' Clauses Act of 1845,⁵ that “successive calls be not *made* at less than the prescribed interval,” probably refers to the time of payment, rather than to the resolution of the directors ordering the call.⁶ And in this country an express provision that only a specified amount shall be assessed at any one time may be evaded by making several assessments of that amount; and this may be done by one resolution of the directors.⁷

1 *Fox v. Allensville etc. Turnpike Co.* 46 Ind. 31; *Haun v. Mulberry etc. Gravel Road Co.* 33 Ind. 193; *Ross v. Lafayette etc. R. R. Co.* 6 Ind. 297; *Spangler v. Indiana etc. R. R. Co.* 21 Ill. 276.

2 8 Vict. ch. 16, § 22.

3 Welland R'y Co. v. Berrie, 6 Hurl. & N. 416.

4 Strafford etc. Co. v. Stratton, 2 Barn. & Adol. 518.

5 8 Vict. ch. 16, § 22.

6 Browne & Theobald's Railway Law, 77, citing *Ambergate R'y Co. v. Mitchell*, 4 Wels. H. & G 540; S. C 4 Eng. L. & Eq. 461.

7 *Penobscot R. R. Co. v. Dummer*, 40 Me. 172; 63 Am. Dec. 654; *Penobscot R. R. Co. v. Dunn*, 39 Me. 587.

§ 160. Of the time and place of payment and the person to whom payable.—The resolution of the directors that a call be made need not specify the time or place of payment,¹ nor the person to whom it shall be payable.² A resolution that a call “shall be made” on a future day is good, and the time, place and manner of payment may be fixed by a distinct act after the original resolution;³ but the time of the call cannot, it seems, be fixed by a mere verbal direction to the secretary of the company.⁴ The time of payment must be reasonable.⁵ In England twenty-one days’ notice at least must be given of each call.⁶ Provisions of the charter or statute or by-laws with respect to the time of notice must be strictly followed. Thus, under a requirement of sixty days’ notice, a notice forty-nine days before is insufficient.⁷ The time and place of payment and the person to whom it is payable may be specified by advertisement.⁸ A call which does not state to whom the assessment shall be paid, “imports that payments should be made to the treasurer, who is the proper and only officer to receive and keep the moneys of the corporation.”⁹ Notice to pay the treasurer of the company is a sufficient designation of the place of payment, to wit, his office.¹⁰

1 *Marsh v. Burroughs*, 1 Woods, 463, as to place and time; *Rutland etc. R. R. Co. v. Thrall*, 35 Vt. 558, as to place; *Great North etc. R'y Co. v. Bidduiph*, 7 Meea. & W. 243, as to place.

- 2 Great North etc. R'y Co. 7 Mees. & W. 243.
- 3 Sheffield etc. R'y Co. v. Woodcock, 7 Mees. & W. 574.
- 4 Johnson v. Lyttle's Iron Agency, 5 Ch. 687.
- 5 Fairfield County Turnpike Co. v. Thorp, 13 Conn. 173. Cf. Hall v. United States Insurance Co. 4 Gill (Md.) 484.
- 6 8 Vict. ch. 16, § 22.
- 7 Macon etc. R. R. Co. v. Vason, 57 Ga. 314. Cf. Muskingum Valley Turnpike Co. v. Ward, 13 Ohio, 120; 42 Am. Dec. 191; Marsh v. Burroughs, 1 Woods, 463.
- 8 Great North etc. R'y Co. v. Biddulph, 7 Mees. & W. 243.
- 9 Danbury etc. R. R. Co. v. Wilson, 22 Conn. 435.
- 10 Muskingum Valley Turnpike Co. v. Ward, 13 Ohio, 120; 42 Am. Dec. 191. Contra, Dexter etc. Plank Road Co. v. Mulder, 3 Mich. 91.

§ 161. Of calls payable in installments.—An installment is one of the several part payments which may be included in a single call.¹ A call may be ordered to be paid in one sum or in installments due at different times.² It is not requisite that a separate call be made for each installment.³ When calls are payable by installments, the day on which the last installment is payable is the day on which the call is payable.⁴ Accordingly "debt will not lie for one installment until all the installments are due and payable."⁵

1 Cook on Stock & Stockh. § 104.

2 Hays v. Pittsburgh etc. R. R. Co. 38 Pa. St. 81; Rutland etc. R. R. Co. v. Thrall, 35 Vt. 536; London etc. R'y Co. v. McMichael, 4 Eng. L. & Eq. 459; S. O. 20 Law J. Ex. 227; Ambergate v. Norcliff, 20 Law J. Ex. 234; Birkenhead etc. R'y Co. v. Webster, and Ambergate R'y Co. v. Norcliff, 20 Law J. Ex. 234; S. cases, 4 Eng. L. & Eq. 461; In re Jennings, 1 Ir. Ch. 151. But see Stratford etc. R'y Co. v. Stratton, 2 Barn. & Adol. 519. Cf. Lewis's Case, 28 Law T. N. S. 396.

3 Penobscot etc. R. R. Co. v. Dummer, 40 Me. 172; 63 Am. Dec. 654; Penobscot etc. R. R. Co. v. Dunn, 39 Me. 587; Ambergate R'y Co. v. Norcliff, 20 Law J. N. S. 234.

4 In re Jennings, 1 Ir. Ch. 654.

5 Birkenhead etc. R'y Co. v. Webster, 6 Ex. 277; S. O. 20 Law J. Ex. 234; S. O. 4 Eng. L. & Eq. 461; Ambergate etc. R'y Co. v. Coulthard, 5 Ex. 459.

§ 162. Notice of calls—Whether a condition precedent to action to enforce payment.—In the absence of some statutory requirement, or some

provision in the charter or by-laws of the company, or some stipulation in the contract of subscription that notice of calls shall be given the subscriber, it is not a condition precedent to an action to enforce payment that the subscriber should have been notified of the call.¹ These decisions rest on the ground that the contract to pay by installments is in effect a promise to pay on demand, and that the demand involved in the suit itself is alone sufficient.² But to say that notice is unnecessary because the subscribers, living as they generally do in different parts of the State and of the country, are presumed in law to know all that is done by the directors, "*seems to us to be raising a presumption against the truth itself.*"³ In several of the American States there are statutes requiring notice of calls to be given and providing that thereupon the shares may be forfeited for non-payment. In New York the statute is interpreted to mean that notice shall be given of the forfeiture proceedings, but that it does not render notice of the call a condition precedent to an action to enforce payment thereof.⁴ The same construction is given to the statute in Indiana;⁵ and in Illinois it is held that a statute regulating notice of calls does not release the shareholder,⁶ and that notice is unnecessary.⁷ But in Maryland, the construction is that notice of the call is a prerequisite of an action to collect;⁸ and the Maryland construction has been applied in Michigan also.⁹

1 *Lake Ontario etc. R. R. Co. v. Mason*, 16 N. Y. 451; *Harlem Canal Co. v. Seixas*, 2 Hall, 504; *Grubbe v. Vicksburg etc. R. R. Co.* 50 Ala. 398; *Eppes v. Mississippi etc. R. R. Co.* 35 Ala. 33; *Wilson v. Wills Valley R. R. Co.* 33 Ga. 466; *Macon etc. R. R. Co. v. Vason*, 57 Ga. 314; *Danbury etc. R. R. Co. v. Wilson*, 22 Conn. 485; *Peake v. Wabash R. R. Co.* 18 Ill. 88; *Penobscot R. R. Co. v. Dummer*, 40 Me. 172; 63 Am. Dec. 654; *Brownlee v. Ohio etc. R. R. Co.* 18 Ind. 68; *Eakright v. Logansport etc. R. R. Co.* 13 Ind. 404; *Smith v. Indiana etc. R'y Co.* 12 Ind. 61; *Breedlone v. Martins-*

personally and in fact, and so proved.”³ When provision is made by statute, charter or by-laws for notice of calls by publication in a gazette or journal, the formalities prescribed must be strictly followed. Thus a requirement that sixty days’ notice be given, is not complied with by publication forty-nine days before.⁴ A provision, however, for notice by publication “at least sixty days,” is complied with by *one* publication sixty days before.⁵ But, although there be provisions for notice by publication, personal notice will be sufficient, the *mode* of giving notice being directory and not of the essence of the provision.⁶

1 *Hall v. United States Insurance Co.* 4 Gill (Md.) 484. *Cf. Louisville etc. Turnpike Co. v. Merriweather*, 5 Mon. B. 13; *Danbury etc. R. R. Co. v. Wilson*, 22 Conn. 435.

2 *Alabama etc. R. R. Co. v. Rawley*, 9 Fla. 608. See *obiter*, *Lake Ontario etc. R. R. Co. v. Mason*, 16 N. Y. 451. See also *Cook on Stock & Stockh.* § 119.

3 *Jeremiah Black, J.*, in *Lincoln v. Wright*, 23 Pa. St. 76; 62 Am. Dec. 316.

4 *Macon etc. R. R. Co. v. Vason*, 57 Ga. 314.

5 *Muskingum Valley Turnpike Co. v. Ward*, 13 Ohio, 120; 42 Am. Dec. 191; *Marsh v. Burroughs*, 1 Woods, 463.

6 *Mississippi etc. R. R. Co. v. Gaster*, 20 Ark. 455. *Cf. Tomlin v. Tonica etc. R. R. Co.* 23 Ill. 429.

§ 165. **Notice of calls—How proven.**—When notice of a call has been given by publication, it cannot be proven by a certificate of the company’s secretary.¹ The printed notice should be placed in evidence.² A copy of the first publication, and the testimony of the publisher that the others were made, is sufficient evidence of several publications.³ When notice is sent by mail, only the person actually posting it can testify to the fact of mailing.⁴ But proof of the fact of mailing is not sufficient; it must be proved to have been received

also.⁵ Whether it was ever received is a question of fact for the jury.⁶ In England, however, a list drawn up by a proper officer of the company, naming the shareholders to whom notices of a call have been posted, is evidence of notice.⁷ An express promise by the subscriber to pay a call which has been already made is presumptive evidence that he had notice of the call;⁸ but if the notice be shown to be insufficient, it is not cured by the promise to pay.⁹

1 *Tomlin v. Tonica etc. R. R. Co.* 23 Ill. 429.

2 *Rutland etc. R. R. Co. v. Thrall*, 35 Vt. 536.

3 *Unthank v. Henry County Turnpike Co.* 16 Ind. 125.

4 *Jones v. Sisson*, 72 Mass. 288.

5 *Hughes v. Antietam Manuf. Co.* 34 Md. 316.

6 *Braddock v. Philadelphia etc. R. R. Co.* 45 N. J. 363.

7 *Eastern Union R'y Co. v. Symonds*, 6 Rail. C. 578. See also *Trotter v. Maclean*, 13 Ch. Div. 574; *Reid v. Harvey*, 5 Q. B. Div. 184.

8 *Miles v. Bough*, 3 Q. B. 845; *Fairfield County Turnpike Co. v. Thorp*, 13 Conn. 173; *Cook on Stock & Stockh.* § 119.

9 *Miles v. Bough*, 3 Q. B. 845.

§ 166. How calls may be proven.—Calls may be proven by the books of the company, which are competent evidence both of the call and of the amount of the installments.¹ An entry by the secretary in the minutes of the meeting of the board of directors, stating simply that the directors held a meeting at a certain time and place, “when it was ordered that a call be made for the full amount of subscription of said company,” has been admitted as sufficient evidence of the making of the call.² And a call, otherwise sufficiently proven, may be valid, notwithstanding a failure to enter the resolution upon the minutes of the meeting.³ An authorized call for a subsequent installment is

evidence that the former had been made by authority.⁴

1 *Barrington v. Pittsburgh etc. R. R. Co.* 34 Pa. St. 358, 364; *Comfort v. Leland*, 3 Whart. 81, 88.

2 *Fox v. Allensville etc. Turnpike Co.* 45 Ind. 31, 37, 38.

3 *Hays v. Pittsburgh etc. R. R. Co.* 38 Pa. St. 81, 91.

4 *Barrington v. Pittsburgh etc. R. R. Co.* 34 Pa. St. 358, 364.

§ 167. **Liability to pay calls—how proven.**—The fact that a person's name appears upon the stock-book of the company raises a presumption that he is the regular and lawful owner of the stock, and that he was a regular subscriber, in the absence of evidence that the stock was acquired by transfer.¹ Thus in a late case, it was held that where a shareholder is sued for an assessment upon a subscription for corporate stock, the fact of his being a shareholder, and the state of his account with respect to his shares, may be proved by corporate books which give a list of the shareholders, the number of shares owned by each, the amount paid, and the balance due on account of stock.² In England it is provided by statute that the production of the register of shareholders shall be *prima facie* evidence of the defendant being a shareholder.³ Errors in the register not relating to the matter in dispute are immaterial.⁴ A mere informal document, not appearing to have been intended as a register, cannot be received as the register.⁵ The English Companies' Clauses Act of 1845 provides that every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, and whose name shall have been entered on the register

of shareholders, shall be deemed a shareholder of the company;⁶ and the word "shareholder" extends to and includes the legal personal representatives.⁷ It is no answer to an action for calls that the shareholder was an infant at the time of registration, where nothing more is alleged.⁸ It must also be shown that while he was an infant, he repudiated the shares,⁹ or that he repudiated the contract within a reasonable time after coming of age.¹⁰ For, allowing shares to remain in his name after majority is a ratification of his liability to the company.¹¹ An equitable mortgagee of shares not standing in his name cannot be held liable for calls.¹² When shares are held by several trustees, and are entered in the books of the company in the name of one of the trustees "and others," the entry is not *prima facie* evidence against the others, their names not appearing therein.¹³

1 *Turnbull v. Payson*, 95 U. S. 418; *Pittsburgh etc. R. R. Co. v. Applegate*, 21 W. Va. 172.

2 *Glenn v. Ore*, 96 N. C. 413.

3 *The Companies' Clauses Act*, 1845, 8 Vict. ch. 16, § 28; *Birkenhead etc. R'y Co. v. Brownrigg*, 4 Ex. 426; *Bain v. Whitehaven R'y Co.* 3 H. L. Cas. 1; *London etc. R'y Co. v. McMichael*, 5 Ex. 855; S. C. 20 Law J. Ex. 6; *Inglis v. Great Northern R'y Co.* 16 Jur. 855; S. C. 1 Macq. 112.

4 *Southampton Docks Co. v. Richards*, 1 Man. & G. 448, 461; *London etc. R'y Co. v. Freeman*, 2 Man. & G. 606.

5 *Wolverhampton etc. Co. v. Hawkesford*, 7 Com. B. N. S. 795.

6 8 Vict. ch. 16, § 8.

7 8 Vict. ch. 16, § 21.

8 *Cork etc. R'y Co. v. Cazenove*, 10 Q. B. 935; *Leeds etc. R'y Co. v. Fearnley*, 4 Ex. 26; *London etc. R'y Co. v. McMichael*, 20 Law J. Ex. 97; 5 Ex. 114.

9 *Newry etc. R'y Co. v. Coombe*, 3 Wels. H. & G. 565. *Cf.* § 80, *supra*.

10 *Dublin etc. R'y Co. v. Black*, 22 Law J. Ex. 94; S. C. 8 Ex. 181.

11 *Cork etc. R'y Co. v. Cazenove*, 10 Q. B. 935.

12 *Newry etc. R'y Co. v. Moss*, 14 Beav. 64.

13 *Birkenhead etc. R'y Co. v. Brownrigg*, 4 Ex. 426.

§ 168. Of interest on calls.—Interest on sub-

scriptions to stock runs from the time that the call is due.¹ The English Companies' Clauses Act of 1845, provides, that "if before or on the day appointed for payment, any shareholder do not pay the amount of any call to which he is liable, then such shareholder shall be liable to pay interest for the same at the rate allowed by law from the day appointed for the payment thereof to the time of actual payment."² A special claim for interest is not necessary in an action under this act; but the amount claimed should cover the interest.³

1 *Gould v. Oneonta*, 71 N. Y. 298; *Burr v. Wilcox*, 22 N. Y. 551.

2 The Companies' Clauses Act, 1845, 8 Vict. ch. 16, § 23.

3 *Browne & Theobald's Railway Law*, 78, citing *South Hampton Dock Co. v. Richards*, 1 Macn. & G. 448; *London etc. Ry Co. v. Fairclough*, 2 Macn. & G. 674.

§ 169. **Demand—Waiver.**—"After notice has been given, no demand is necessary before bringing suit to collect."¹ The fact that other subscribers have had no notice of a call is immaterial.² The making of the call, or informalities in the notice thereof, may be waived by the subscriber, either expressly or by implication from certain acts.³ But payment of a portion of the subscription is no waiver of the right to require calls to be made for the balance;⁴ and the vote of a city to pay a call does not waive its invalidity.⁵ The waiver must be clearly proven.⁶

1 *Cook on Stock & Stockh.* § 120; *Winters v. Muscogee R. R. Co.* 11 Ga. 438; *Penobscot etc. R. R. Co. v. Dummer*, 40 Me. 172; 63 Am. Dec. 651; *Goodrich v. Reynolds*, 31 Ill. 491; 83 Am. Dec. 240. Cf. *Spangler v. Indiana etc. R. R. Co.* 21 Ill. 276.

2 *Shackleford v. Dangerfield*, Law R. 3 Com. P. 407; *Newry etc. Ry Co. v. Edmunds*, 2 Wels. H. & G. 118.

3 *Macon etc. R. R. Co. v. Vason*, 57 Ga. 314; *Rutland etc. R. R. Co. v. Thrall*, 35 Vt. 535.

4 *Grosse Isle Hotel Co. v. I'Anson*, 43 N. J. 442.

5 *Pike v. Bangor etc. R. R. Co.* 63 Me. 445.

6 *Rutland etc. R. R. Co. v. Thrall*, 35 Vt. 536.

§ 170. **Pleading—Measure of damages—Limitation.**—The pleadings in an action to enforce payment of calls must allege the various facts that complete the obligation of the subscriber to pay.¹ Under the English Companies' Clauses Act of 1845, it is sufficient for the company to prove in an action to enforce the payment of calls, "that the defendant at the time of making such calls was a holder of one share or more in the undertaking, and that such call was in fact made, and such notice thereof given as is directed by this or the special act; and it shall not be necessary to prove the appointment of the directors who made such call, nor any other matter whatsoever;"² and thereupon the company shall be entitled to recover with interest, unless it appear that the call exceeded the prescribed amount, or that due notice had not been given, or that the prescribed interval between two successive calls had not elapsed, or that the calls for the year were in excess of the prescribed amount.³ The measure of damages in an action on a call is the amount of the call with interest from the time of default of payment.⁴ An action for calls under the Companies' Clauses Act of 1845,⁵ will not lie against a person who is not shown to be the holder of some specific shares.⁶ In England the liability for calls being created by statute, the limitation thereon is twenty years.⁷ When no call has been made by the corporation, the statute of limitations does not begin to run until a decree of court orders the amount due upon the subscription to be paid.⁸

1 Bethel etc. Bridge Co. v. Beane, 58 Me. 89; Cook on Stock & Stockh. § 120. See also Spangler v. Indiana etc. R. R. Co. 21 Ill. 276, where the customary averments are set forth. Cf. Peake v. Wabash R. R. Co. 18 Ill. 88.

2 8 Vict. ch. 16, § 27.

3 The Companies' Clauses Act, 1845, 8 Vict. ch. 16, § 27.

4 Upton v. Burnham, 3 Biss. C. C. 520; Gould v. Oneonta, 71 N. Y. 298; Southern etc. R. R. Co. v. Moravia, 61 Barb. 180. The amount of the call with lawful interest from the day on which it was payable: 8 Vict. ch. 16, § 25.

5 8 Vict. ch. 16, § 26.

6 Wolverhampton etc. Co. v. Hawkesford, 6 Com. B. N. S. 336.

7 Cork etc. R'y Co. v. Goode, 22 Law J. Com. P. 193; S. C. 13 Com. B. 826.

8 Hawkins v. Glenn, (1889) 131 U. S. 319; Lehman v. Glenn, (86 Ala. 1889) *supra* § 152, n. 11. Acc. Powell v. Oregonian R'y Co. (1889) 38 Fed. Rep. 187.

CHAPTER VIII.

OF THE FORFEITURE OF SHARES OF STOCK.

- § 171. The several remedies of the company against delinquent stockholders.
- § 172. Of voluntary surrender and abandonment.
- § 173. Of the remedy by forfeiture and sale.
- § 174. Of tender before forfeiture and sale.
- § 175. The remedy by forfeiture and sale is statutory—The statute to be strictly followed.
- § 176. The method of forfeiture—Statutory provisions concerning, strictly construed.
- § 177. Notice of forfeiture requisite—Notice not equivalent to forfeiture.
- § 178. Notice of forfeiture—The New York and English statutes.
- § 179. The remedy by forfeiture is not exclusive of the common law remedies.
- § 180. Whether the shareholder is liable for deficiency after forfeiture and sale.
- § 181. Forfeited shares may be reissued.
- § 182. The liability of the purchaser at forfeiture sale.
- § 183. The effect of forfeiture upon the shareholder's liability to creditors.
- § 184. Equity will relieve against unauthorized forfeiture.

§ 171. **The several remedies of the company against delinquent stockholders.**—The corporation has several remedies against a shareholder refusing or failing to pay calls or assessments upon his stock. It may bring an action at law for breach of contract, and recover in damages the difference between the amount subscribed and the market value of the stock at the date of the refusal to pay.¹ It may sue for the amount of the subscription, and obtaining judgment, sell the stock under execution and levy.² It may bring an ordinary action in as-

sumpsit.³ It may, under statutory authority, forfeit the shares.⁴ And it may proceed by strict foreclosure. A strict foreclosure of shares of stock can be effected only under the enabling power of a statute. It resembles in general a strict foreclosure of a mortgage of realty. The stock is not sold at public sale, but is taken back into the possession of the corporation itself, and the proceeding amounts to nothing more than a statutory cancellation of the contract.⁵ The company may then sell the stock at less than par.⁶ The modern tendency is to discourage this mode of procedure.⁷ The company may also accept a voluntary surrender of shares where it appears more advisable to do so than to avail itself of the remedies mentioned.⁸

1 *Rand v. White Mountains R. R. Co.* 40 N. H. 79.

2 *Chase v. East Tennessee etc. R. R. Co.* 5 Lea, 415.

3 *Infra*, § 179.

4 *Infra*, § 173.

5 *Cook on Stock & Stockh.* § 122.

6 *Ramwell's Case*, 50 Law J. Ch. 827.

7 *Cook on Stock & Stockh.* § 122. The leading case on this subject is *People v. Susquehanna R. R. Co.* 53 Barb. 314. See also *Connecticut etc. R. R. Co. v. Bailey*, 21 Vt. 465; 58 Am. Dec. 181.

8 *Infra*, § 172. Cf. *Emden's Practice and Forms in Winding-up Companies* (3rd ed. 1889), 253.

§ 172. Of voluntary surrender and abandonment.—Ordinarily the shareholder cannot himself work a forfeiture by abandonment.¹ A subscriber cannot plead as a defense to an action to enforce payment brought in behalf of the corporate creditors, that the company might have forfeited his stock.² For although forfeiture is imposed as a penalty for breach of the promise to pay, it is not for the subscriber to elect by submitting to the forfeiture or rendering himself liable thereto to es-

cape the obligation to pay.³ But it is sometimes provided that membership in the company may cease upon the application of a member at a regular meeting of the stockholders,⁴ and upon a surrender of his shares.⁵ It is provided by statute in England that the company may from time to time accept, on such terms as they think fit, surrenders of any shares which have not been fully paid up;⁶ but it shall not pay or refund to any shareholder any sum of money for or in respect of the cancellation or surrender of any share.⁷ A stockholder, who surrenders his shares to the corporation before making any payment on them, is not liable to a creditor of the corporation whose demand comes into existence subsequently to such surrender.⁸

1 *Rockville etc. Turnpike Co. v. Maxwell*, 2 Cranch C. C. 451 *Cf. Mills v. Stewart*, 41 N. Y. 384; *Laurel Run Building Assoc. v. Sperring*, 106 Pa. St. 334.

2 *Mann v. Currie*, 2 Barb. 294; *Sagory v. Dubois*, 3 Sand. Ch. 466; *Hightower v. Thornton*, 8 Ga. 486, 502; 52 Am. Dec. 412.

3 *Troy etc. R. R. Co. v. McChesney*, 21 Wend. 296.

4 *Farnsworth v. Robbins*, 36 Minn. 369.

5 *Johnson v. Lullman*, 15 Mo. App. 55.

6 26 & 27 Vict. ch. 118, § 9.

7 26 & 27 Vict. ch. 118, § 10.

8 *Johnson v. Lullman*, 15 Mo. App. 55.

§ 173. Of the remedy by forfeiture and sale.—With respect to the forfeiture of shares for non-payment of calls, it is enacted by the English Companies' Clauses Act of 1845,¹ that if any shareholder fail to pay the call with interest, if any has accrued, the directors at any time after the expiration of two months from the day appointed for payment may declare the share in respect of which the call was payable forfeited, whether the company have sued for the amount of the call or not. This decla-

ration of forfeiture shall not take effect so as to authorize the sale or disposition of the shares until the declaration has been confirmed by a general meeting of the company held at least two months after the notice of forfeiture to the shareholder.² After confirmation of the forfeiture, the directors may sell the share or shares at public or private sale.³ The company may not sell any more of the shares of a defaulter than is necessary for the payment of the amount due from him on calls.⁴ If the forfeited shares cannot be sold they may be canceled,⁵ but cancellation shall not affect the right of the company to compel the holder to pay arrears of calls, interest and expenses due at the time of cancellation,⁶ deducting therefrom, however, the value of the shares.⁷ It is enacted by the General Railroad Act of New York that if any stockholder shall neglect to pay any installment as required by a resolution of the board of directors, the said board shall be authorized to declare his stock, and all previous payments thereon, forfeited for the use of the company.⁸ A resolution of forfeiture must designate the shares forfeited.⁹ Directors who forfeit shares without selling them are bound to credit the shareholder with the highest market price, without allowance for the effect upon the market of offering a large number of shares for sale.¹⁰ By failure to exercise the right of forfeiture as the successive defaults of payment occur, the company will be barred from its remedy by forfeiture.¹¹

1 8 Vict. ch. 16, § 29.

2 8 Vict. ch. 16, § 31.

3 8 Vict. ch. 16, § 32.

4 8 Vict. ch. 16, § 34.

5 The Companies' Clauses Act (1863), 26 & 27 Vict. ch. 113, § 4.

- 6 26 & 27 Vict. ch. 118, § 5.
- 7 26 & 27 Vict. ch. 118, § 6.
- 8 N. Y. Laws of 1850, ch. 140, § 7.
- 9 Johnson v. Albany etc. R. R. Co. 40 How. Pr. 193.
- 10 Stubbs v. Lister, 1 Younge & C. Ch. 81.
- 11 Harlem Canal Co. v. Seixas, 2 Hall, 504; Stokes v. Lebanon etc. Turnpike Co. 6 Humph. 241; Delaware Canal Co. v. Sansam, 1 Binn. 70.

§ 174. Of tender before forfeiture sale.—Legal tender at any time before actual sale will preclude the company from proceeding further with the forfeiture.¹ The English Companies' Clauses Act of 1845 provides, on payment of calls and interest and expenses, made before any share that has been forfeited be sold, "such share shall revert to the party to whom the same belonged before such forfeiture, in such manner as if such calls had been duly paid."² And even after sale, when the articles of association do not prescribe the mode of forfeiture, it has been held that an equity of redemption remains.³

1 Walker v. Ogden, 1 Biss. 287; Mitchell v. Vermont etc. Co. 67 N. Y. 280, where a check for the amount due being refused, the forfeiture was set aside by the court: Sweney v. Smith, Law R. 7 Eq. 324.

2 8 Vict. ch. 16, § 35.

3 Walker v. Ogden, 1 Biss. 287. This is declared by the leading authority on stock and stockholders to be "very doubtful law." Cook on Stock & Stockh. § 134, n. 4, citing Vatable v. New York etc. R. R. Co. 96 N. Y. 49. See, also, *infra*, § 184.

§ 175. The remedy by forfeiture and sale is statutory—The statute to be strictly followed. The power of a corporation to forfeit unpaid stock, and selling the same to apply the proceeds to payment of the subscription, is a statutory right only,¹ and cannot be created by the by-laws of the company.² Even a temporary forfeiture until payment of assessments or fines, cannot be authorized by a by-law.³ And forfeitures under authority of a by-law are

wholly void, conferring no title upon the vendee.⁴ The power of forfeiture and sale being entirely statutory, the provisions of the statute must be strictly complied with. For example, where authority is given the directors "to order the treasurer to sell," they have no authority to order the sale to be made by another.⁵ So the statutory requirements with respect to notice of forfeiture must be strictly followed, and the pleadings should aver that this has been done.⁶ If, therefore, the notice to the shareholder claims interest from the date of the call instead of from the time of its payment, a subsequent forfeiture is invalid.⁷ And a forfeiture declared, but not ratified by a general meeting according to the provision of the Companies Act of 1845,⁸ is void, and cannot be plead by way of defense by the shareholder in an action against him to enforce payment.⁹ Where a statute confers upon corporations the authority to pass by-laws regulating the sale of stock of delinquent shareholders, the power of the company to effect a valid sale is dependent upon its having made such by-laws; and a resolution of the directors ordering a sale in a particular case is not equivalent thereto.¹⁰

1 N. Y. Laws of 1848, ch. 40, § 6; N. Y. Laws of 1850, ch. 140, § 7; Ind. Rev. Stat. 1881, § 3896; 8 Vict. ch. 16, § 23, *et seq.*; Hill v. Nisbet, 100 Ind. 341; Perrin v. Granger, 30 Vt. 595; Westcott v. Minnesota etc. Co. 23 Mich. 145; Williams v. Lowe, 4 Neb. 382; Dixon v. Evans, Law R. 5 H. L. 606; Clarke v. Hart, 6 H. L. Cas. 633; Campbell's Case, Law R. 9 Ch. 1.

2 *In re Long Island R. R. Co.* 19 Wend. 37; 32 Am. Dec. 429; Kirk v. Norwill, 1 Term. Rep. 118. Cf. Kennebec etc. R. R. Co. v. Kendall, 31 Me. 470.

3 Cartan v. Father Mathew etc. Soc. 3 Daly, 20; Adley v. Reeves, 2 Maule & S. 53.

4 *In re Long Island R. R. Co.* 19 Wend. 37; 32 Am. Dec. 429. But see Lesseps v. Architects' Co. 4 La. Ann. 316, where a subscriber who had voted for such a by-law was held estopped to deny its authority. Cf. Perrin v. Granger, 30 Vt. 595; Detweiler v. Breckencamp, 83 Mo. 45; Knight's Case, Law R. 2 Ch. 321.

5 *York etc. R. R. Co. v. Ritchie*, 40 Me. 425.

6 *Sands v. Sanders*, 26 N. Y. 239; *Alabama etc. R. R. Co. v. Rawley*, 9 Fla. 508; *Mississippi etc. R. R. Co. v. Gastner*, 20 Ark. 455; *Wear v. Jacksonville etc. R. R. Co.* 24 Ill. 593; *Spangler v. Indiana etc. R. R. Co.* 21 Ill. 276.

7 *Johnson v. Little's Iron Agency*, 5 Ch. Div. 687.

8 8 Vict. ch. 16, § 31.

9 *London etc. R'y Co. v. Fairclough*, 3 Scott N. R. 68; *S. C. Man. & G.* 674; 2 Rail. C. 544.

10 *Budd v. Multnomah Street R'y Co.* (1887) 15 Oregon, 404; 53 Cal. Rep. 355; 659. *Cf. Oregon Misc. Laws (Hill)*, § 3221.

§ 176. **Of the method of forfeiture—Statutory provisions concerning, strictly construed.**—The power to forfeit shares of stock for non-payment of the subscription, being wholly statutory, penal in nature, and “one of those forfeitures against which, if regular, equity does not relieve,”¹ it is to be strictly construed; and if any restrictions or limitations are disregarded, the alleged act of forfeiture must be declared invalid.² If no formal mode of procedure be prescribed, the forfeiture must be reasonably and justly conducted.³ In such a case it has been held that a general resolution of the directors that all stock on which assessments shall remain unpaid at a certain future date shall be sold, will effect a valid forfeiture;⁴ but the better rule would seem to be that a general resolution, not specifying the shares to be forfeited, is not sufficient.⁵ It is not essential to a valid forfeiture that the shareholder's name should have been removed from the register.⁶ A forfeiture defective in form, or irregular for want of authority, is voidable, but not absolutely void unless contested, both the shareholder and the company being subject to the rules of waiver and acquiescence.⁷ Mere acquiescence, however, has been said not to bar the shareholder's

right to equitable relief against an invalid forfeiture.⁸

1 *Germantown etc. R'y Co. v. Fidler*, 60 Pa. St. 124; 100 Am. Dec. 546; *Garden Gully etc. Co. v. McLister*, Law R. 1 App. O. 39.

2 *Germantown etc. R'y Co. v. Fidler*, 60 Pa. St. 124; 100 Am. Dec. 546; *In re Long Island R. R. Co.* 19 Wend. 37; 32 Am. Dec. 429; *Eastern etc. Plank R. Co. v. Vaughn*, 20 Barb. 115; *Downing v. Potts*, 23 N. J. 66; *Portland etc. R. R. Co. v. Graham*, 11 Met. 1; *Lewey's Island R. R. Co. v. Bolton*, 43 Me. 451; 77 Am. Dec. 236; *York etc. R. R. Co. v. Ritchie*, 40 Me. 425. *Cf.* *Johnson v. Albany etc. R. R. Co.* 40 How. Pr. 193; *Rutland etc. R. R. Co. v. Thrall*, 35 Vt. 536; *Clark v. Hart*, 6 H. L. Cas. 633. But *Knight's Case*, Law R. 2 Ch. 321, and other cases, earlier than those cited above, would seem to show that formerly a substantial rather than a strict compliance with the statute was deemed sufficient: *Catchpole v. Ambergate R'y Co.* 1 El. & B. 111; *Naylor v. South Devon R'y Co.* 1 De Gex & S. 32. *Cf.* *Howbeach etc. Co. v. Teague*, 5 Hurl. & N. 151; *Nolan v. Arabella etc. Co. Wyatt, Webb & A'Bickett*, (Victoria, Australia), 38.

3 *Mitchell v. Vermont etc. Co.* 67 N. Y. 280. Thus there must be notice reasonable in point of time. Thirty days has been held sufficient: *Rutland etc. R. R. Co. v. Thrall*, 35 Vt. 536. But a notice three days before, the shareholder living out of the state, is insufficient: *Lexington etc. R. R. Co. v. Staples*, 71 Mass. 520.

4 *Rutland etc. R. R. Co. v. Thrall*, 35 Vt. 536. *Cf.* *Knight's Case*, 15 Law T. N. S. 546.

5 *Johnson v. Albany etc. R. R. Co.* 40 How. Pr. 193.

6 *In re Travistock etc. Co.* 38 Law J. Ch. 616.

7 *Kelk's Case*, Law R. 9 Eq. 107; *Knight's Case*, Law R. 2 Ch. 321; *King's Case*, Law R. 2 Ch. 714, 731; *Austin's Case*, 24 Law T. N. S. 932; *Webster's Case*, 32 Law J. Ch. 135; *Woolaston's Case*, 4 De Gex & J. 437; *Pendergast v. Turton*, 1 Younge & C. Ch. 98. *Cf.* *In re Long Island R. R. Co.* 19 Wend. 37; 32 Am. Dec. 429; *Kennebec etc. R. R. Co. v. Kendall*, 31 Me. 470.

8 *Garden Gully etc. Co. v. McLister*, Law R. 1 App. O. 39, 55.

§ 177. Notice of forfeiture requisite—Notice not equivalent to forfeiture.—It is a condition precedent to the validity of a forfeiture, that the subscriber be served with notice complying strictly with the statute or charter, stating the amount due, the time within which payment must be made, and the place of sale.¹ The method, however, of giving notice has been said to be directory rather than mandatory,² so that a charter provision for notice of forfeiture by publication does not preclude personal notice;³ and a provision for notice by letter sent by mail is sufficiently complied with by leaving

the letter at the house of the shareholder, provided it be received by him as soon as he is entitled to receive it by mail.⁴ It would seem that notice of the intent to forfeit having been given, no further notice that the shares have been forfeited is required.⁵ Notice of impending forfeiture is not equivalent to forfeiture; nor can it be effected *ipso facto* by the failure of the shareholder to pay within the time specified in the notice; there must be a due declaration of forfeiture at a lawful corporate meeting.⁶

1 *Lake Ontario etc. R. R. Co. v. Mason*, 16 N. Y. 471; *Mississippi etc. R. R. Co. v. Gaster*, 40 Ark. 455; *Rutherford etc. R. R. Co. v. Threll*, 35 Va. 646; *Lexington etc. R. R. Co. v. Staples*, 71 Mass. 27; *Lexington etc. R. R. Co. v. Chandler*, 13 Met. 311; *Lewey's Island R. R. Co. v. Bolton*, 48 Me. 451; 77 Am. Dec. 236; *Horton v. Cincinnati etc. R. R. Co.*, 16 Ind. 375; 70 Am. Dec. 47; *Knight's Case*, Law R. 2 Ch. 321; *Birmingham etc. R'y Co. v. Locke*, 1 Q. B. 256; *Watson v. Litch*, 23 B. & C. 14, where the time of forfeiture was stated to be Monday the 9th inst. (falling on a Friday), and the notice set this sufficient. *Cochran v. P. & O. R. R.*, 18 N. Y. 592; *Schenectady etc. R. R. Co. v. Thatcher*, 11 N. Y. 102; *Epps v. Mississippi etc. R. R. Co.*, 35 Ala. 33; *New Albany etc. R. R. Co. v. McCormick*, 10 Ind. 436; 71 Am. Dec. 337.

2 *Mississippi etc. R. R. v. Gaster*, 20 Ark. 455; *Schenectady etc. Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Lexington etc. R. R. Co. v. Chandler*, 13 Met. 311; *Knight's Case*, Law R. 2 Ch. 321. But see *Lewey's Island R. R. Co. v. Bolton*, 48 Me. 451; 77 Am. Dec. 236.

3 *Mississippi etc. R. R. Co. v. Gaster*, 20 Ark. 455.

4 *Lexington etc. R. R. Co. v. Chandler*, 13 Met. 311. Cf. *Birmingham etc. R'y Co. v. Locke*, 1 Q. B. 256; *Graham v. Van Dieman's Land Co.*, 1 Hurl. & N. 541; *Cockerell v. Van Dieman's Land Co.*, 26 Law J. Com. P. 303; *South Staffordshire R'y Co. v. Burnside*, 5 Ex. 129.

5 *In re North Hallensbeagle etc. Co.*, 36 Law J. Ch. 317.

6 *Macon etc. R. R. Co. v. Vason*, 37 Ga. 314; *Water Valley Manuf. Co. v. Seaman*, 53 Miss. 655; *Biggs' Case*, Law R. 1 Eq. 309; *Cockerell v. Van Dieman's Land Co.*, 26 Law R. Com. P. 303. *Contra*, *Knight's Case*, Law R. 2 Ch. 321.

§ 178. Notice of forfeiture.—The New York and English statutes.—The New York General Railroad Act of 1850 directs that no forfeiture shall be declared by the directors until they shall have caused a notice in writing to be served on the shareholder "personally, or by depositing the

same in the post-office properly directed to him at the post-office nearest his usual place of residence, stating that he is required to make such payment at the time and place specified in such notice, and that if he fails to make the same, his stock and all previous payments thereon will be forfeited for the use of the company, which notice shall be served as aforesaid at least sixty days previous to the day on which such payment is required to be made.¹ In England, under the Companies' Clauses Act of 1845, before a declaration of forfeiture, notice must be given the shareholder, by serving the notification at his place of abode, or sending it by mail, if his address be known, or if not known, by publication in the *London or Dublin Gazette*, and the notice must be given at least twenty-one days before declaration of forfeiture.²

1 N. Y. Laws of 1850, ch. 140, § 7; amended to read, "at least thirty days," by N. Y. Laws of 1875, ch. 103, § 8.

2 8 Vict. ch. 16, § 30.

§ 179. **The remedy by forfeiture is not exclusive of the common-law remedies.**—In those States in which the law implies from the subscription itself a promise to pay for the shares of stock,¹ and in all the States, whenever there is an express promise to pay, the statute conferring upon the company authority to forfeit and sell the shares of delinquent stockholders does not by implication exclude the common-law remedy for the enforcement of payment. The company may select either remedy;² but it may not avail itself of both. It may, after declaring the stock forfeited, sue the shareholder for the balance which the sale of his

§ 180. **Whether the shareholder is liable for deficiency after forfeiture and sale.**—The corporation may sue to enforce payment or declare the stock forfeited at its option, and may defer forfeiture until it has exhausted its remedy by suit. If it sue and collect the subscription, the subscriber remains a stockholder. If it declare the stock forfeited, the stockholder loses all previous payments, and ceases to be a member of the corporation. "To make him lose his previous payments and his stock and still be liable for the deficiency which the compulsory sale of his stock fails to pay would be injustice, unless the charter or general law made such a rule, and the subscriber signed with knowledge of it."¹ For after forfeiture the shareholder ceases to have any title or interest in the stock. If the proceeds of the forfeiture sale are more than the amount due he cannot claim the surplus, nor if less is he liable for the deficiency.² But only after actual forfeiture and sale of the shares is an action to enforce payment barred; for as long as the stockholder retains a title to his shares his obligation to pay for them continues.³ There are cases, however, which hold that the company, after forfeiture and sale, may sue the former holder of the shares for the deficiency between the amount due and the amount realized at the forfeiture sale.⁴ And the right to sue for the deficiency is sometimes conferred upon the company by its charter or by statute;⁵ whether the holder of the stock be the original subscriber or a transferee.⁶ When the statute authorizes the company to sue the subscriber for the deficiency between the amount due from him and the amount realized at the forfeiture

sale, and the forfeiture has been declared and the sale advertised, but for want of bidders the stock was not sold, the company may then proceed against the subscriber by action at law.⁷ Where both remedies exist, the remedy upon the contract of subscription may be brought before the stock is forfeited;⁸ but where the statute makes the subscriber liable for the deficiency in the proceeds of the forfeiture sale, forfeiture must be duly made and the shares sold before suit can be brought.⁹

1 *Rutland etc. R. R. Co. v. Thrall*, 35 Vt. 536, 553.

2 *Small v. Herkimer Manuf. Co.* 2 N. Y. 330; *Ashton v. Burbank*, 2 Dill. 435; *Macon etc. R. R. Co. v. Vason*, 57 Ga. 314; *Allen v. Montgomery etc. R. Co.* 11 Ala. 437. *Cf. Mills v. Stewart*, 41 Vt. 381.

3 *Macon etc. R. R. Co. v. Vason*, 87 Ga. 314; *Instone v. Frankfort Bridge Co.* 2 Bibb, 576; *Am. Dec.* 638. *Cf. Buffalo etc. R. R. Co. v. Dudley*, 14 N. Y. 356, 347.

4 *Carson v. Arctic Mining Co.* 5 Mich. 288; *Inglis v. Great Northern R'y Co.* 1 Macq. 112; *Great Northern R'y Co. v. Kennedy*, 4 Welsby, H. & G. 417, 425; *Stokes v. Lebanon Turnpike Co.* 6 Humph. 241; *Herkimer Manuf. Co. v. Small*, 21 Wend. 273; *Troy etc. R. R. Co. v. McChesney*, 21 Wend. 295. These New York cases were overruled, however, in *Small v. Herkimer Manuf. Co.* 2 N. Y. 330.

5 *Brookenbrough v. James River etc. Co.* 1 Pat. & H. 94; *Merrimac Mining Co. v. Bagley*, 14 Mich. 501; *Danbury etc. R. R. Co. v. Wilson*, 22 Conn. 435, 456; *Oryke's Case*, Law R. 5 Ch. 63; *Stocken's Case*, Law R. 5 Eq. 6.

6 *Merrimac Mining Co. v. Bagley*, 14 Mich. 501. *Cf. Hartford etc. R. R. Co. v. Kennedy*, 12 Conn. 499; *Mann v. Currie*, 2 Barb. 294.

7 *Grays v. Turnpike Co.* 4 Rand. (Va.) 578; *Franklin Glass Co. v. White*, 14 Mass. 286.

8 *Boston etc. R. R. Co. v. Wellington*, 113 Mass. 79; *Wood's Railway Law*, § 59.

9 *Athol etc. R. R. Co. v. Prescott*, 110 Mass. 213.

§ 181. **Forfeited shares may be reissued.**—The company may issue new shares in lieu of those that have been canceled or forfeited.¹ For neither forfeiture, surrender nor cancellation of shares of stock, amounts to more than the destruction of the rights and liabilities of a particular shareholder therein, and, if necessary, of the pieces of paper or other

documents representing the same.' The capital of the company being totally distinct from the rights of the shareholders therein, the capital stock is not thereby diminished; and immediately upon the cancellation or forfeiture of one member's interest, the company may issue new shares of an equivalent amount.²

1 26 & 27 Vict. ch. 118, § 11; *Currier v. Slate Co.* 53 N. H. 262; *State v. Smith*, 49 Vt. 236; *Taylor v. Miami etc. Co.* 6 Ohio, 176; S. C. 5 Ohio, 162; 23 Am. Dec. 785.

2 Erice's *Ultra Vires*, 192, citing *dictum* in *Marshall v. Glamorgan Iron Co.* Law R. 7 Eq. 137.

§ 182. The liability of the purchaser at forfeiture sale.—If the stock has been only partially paid for, the purchaser at the forfeiture sale must pay the installments due and to become due, and if he fail to do so, the shares must be sold again.¹ In England it is enacted that the purchaser at a forfeiture sale holds the shares discharged of all calls due prior to purchase.² He is not bound to see to the application of the purchase-money, nor is his title to be affected by any irregularity in the proceedings in reference to the sale.³ The statutory provision in California,⁴ that the legal title to corporate stock, bought in by the company, upon a sale for delinquent assessments, shall vest in the corporation, but shall be held subject to the control of the shareholders, has been held to exempt such title from execution against the corporation.⁵

1 *Cook on Stock & Stockh.* § 133; *Sturges v. Stetson*, 1 Biss. 246, 251.

2 8 Vict. ch. 16, § 33.

3 8 Vict. ch. 16, § 33.

4 Cal. Civ. Code, § 344.

5 *Robinson v. Spaulding etc. Co.* (1887) 72 Cal. 32.

§ 183. The effect of forfeiture upon the shareholder's liability to creditors.—A *bona-fide* for-

feiture under power duly conferred upon the corporation by charter or statute,¹ releases the shareholder from liability not only to the company itself but also to corporate creditors,² whether they became creditors of the company after or before the forfeiture.³ The right of forfeiture must be exercised by the directors solely for the benefit of the corporation and its creditors.⁴ There should be no forfeiture when the shareholder is solvent.⁵ Directors will not be compelled to perform a contract with a shareholder to forfeit his shares, the power to forfeit being vested in them for the benefit of the company and not of individual shareholders.⁶ A shareholder cannot by collusion with the directors procure a forfeiture which will enable him to evade his liability either to the corporation or its creditors.⁷ A fraudulent forfeiture with that intent may be enjoined, if not consummated, and if accomplished, set aside.⁸

1 Not, however, by by-law: *Creyke's Case*, Law R. 5 Ch. 63. See, also, § 175, *supra*.

2 *Mills v. Stewart*, 41 N. Y. 334; *Allen v. Montgomery etc.* R. R. Co. 11 Ala. 437, 450; *Macaulay v. Robinson*, 18 La. An. 619; *Ex parte Beresford*, 2 Macn. & G. 197; *Woollaston's Case*, 4 De Gex & J. 437; *Kelk's Case*, Law R. 9 Eq. 107; *Dawes' Case*, Law R. 6 Eq. 232; *Sneek's Case*, Law R. 5 Ch. 22. A shareholder may be relieved from individual liability for a corporate debt by the corporation canceling the stock before the debt is created, the issue having been on the false pretense of a stock dividend having been earned: *Hollingshead v. Woodward*, 35 Hun (N. Y.), 410.

3 *Mills v. Stewart*, 41 N. Y. 334.

4 *Bedford R. R. Co. v. Bowser*, 48 Pa. St. 29, and cases cited *supra*.

5 *Chouteau v. Dean*, 7 Mo. App. 211; *Spackman v. Evans*, Law R. 3 H. L. 171. *Cf.* *Bedford R. R. Co. v. Bowser*, 43 Pa. St. 29.

6 *Harris v. North Devon R'y Co.* 20 Beav. 384. See, also, *Price v. Denhigh etc. R'y Co.* Law J. 38 Ch. 461.

7 *Burke v. Smith*, 16 Wall, 394; *Mills v. Stewart*, 41 N. Y. 334, 336; *Slee v. Bloom*, 19 Johns. 456; 10 Am. Dec. 273; *Hall's Case*, Law R. 5 Ch. 707; *Stanhope's Case*, Law R. 1 Ch. 161; *In re Agricultural Ins. Co.* Law R. 1 Ch. 161; *Stewart's Case*, Law R. 1 Ch. 511; *Gower's Case*, Law R. 6 Eq. 77; *Spackman's Case*, 11 Jur. N. S. 207; *Richmond's Case*, 4 Kay & J. 305; *Walter's Second Case*, 3 De Gex & S. 244; *Ex parte Jones*, Law J. 27 Ch. 666; *Thompson's Liability of Stockholders*, § 194.

8 *Germanatown etc. R'y Co. v. Fidler*, 60 Pa. St. 124; 100 Am. Dec. 546.

§ 184. **Equity will relieve against unauthorized forfeiture.**—If any one of the assessments for non-payment of which the forfeiture was declared be illegal, the forfeiture is void;¹ equity will relieve against an unauthorized forfeiture by setting the proceeding aside,² not by giving the plaintiff an undivided interest in the property of the company.³ The shareholder may proceed also by an action for damages, in which case the measure of damages will be the sum realized at the forfeiture sale less the amount of unpaid calls due upon the stock.⁴ But where the proceedings are in all respects regular, and the company is vested with the requisite authority, equity will not, except in rare instances, relieve against a forfeiture of shares of stock.⁵ The action to set aside the forfeiture should be brought in the State of the company's domicile.⁶

1 *Lewey's Island R. R. Co. v. Bolton*, 43 Me. 451; 77 Am. Dec. 236; *Stoneham etc. R. R. Co. v. Gould*, 2 Gray, 277; *Portland etc. R. R. Co. v. Graham*, 11 Met. 1.

2 *Mitchell v. Vermont etc. Co.* 67 N. Y. 280; *Spackman v. Evans*, Law R. 3 H. L. 171; *Taylor v. Midland R'y Co.* 23 Beav. 287; *Sweny v. Smith*, Law R. 7 Eq. 324; *Dixon's Case*, Law R. 5 Ch. 79; *Thompson's Liability of Stockholders*, 226, and cases cited *supra* in this chapter on the subject of forfeiture. See, also, *Bottomley's Case*, 16 Ch. Div. 681, cited in *Emden's Practice and Forms in Winding-up Companies* (3rd ed. 1889), 260.

3 *Smith v. Maine Box Tunnel Co.* 18 Cal. 111.

4 *Budd v. Multnomah Street R'y Co.* (1887) 15 Oregon, 404.

5 *Small v. Herkimer*, 2 N. Y. 330, 340; *Germantown etc. R'y Co. v. Fitler*, 60 Pa. St. 124; 100 Am. Dec. 546; *Peterborough R. R. Co. v. Nashua etc. R. R. Co.* 59 N. H. 385; *Wilkins v. Thorne*, 60 Md. 253; *Marshall v. Golden Fleece etc. Co.* 16 Nev. 156; *Naylor v. South Devon R'y Co.* 1 De Gex & S. 32; *Sparks v. Company of the Proprietors etc.* 13 Ves. 428. Cf. *Ludlow v. Dutch etc. R'y Co.* 21 Beav. 43.

6 *North State etc. Co. v. Field*, 40 Md. 151; *Ludlow v. Dutch Rhenish R'y Co.* 21 Beav. 43.

CHAPTER IX.

MUNICIPAL AID.

(A). The Grant of Authority to the Municipality.

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(B). The Submission to Popular Vote.

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- § 217. Of assignment of interest in tax—Of forfeiture of charter of railway.

(A.) *The Grant of Authority to the Municipality.*

§ 185. **Authority of municipalities to aid railway enterprises dependent upon legislative grant.** When a municipal corporation possesses authority to aid in the construction of railways, it may exercise its power either by a subscription to the capital stock of the companies, or by donations of property or money.¹ But, inasmuch as to aid or to become a stockholder in any private corporation is manifestly foreign to the usual purposes intended to be subserved by the creation of municipal corporations,² a municipality can have no implied or inherent power independent of legislative grant to lend its aid to railway enterprises,³ neither by subscription to the stock of the company,⁴ nor by way of donation.⁵

1 That authority to aid authorizes donations, see *State v. Babcock*, 19 Neb. 230; *Wood v. Commissioners of Oxford* (1887), 97 N. C. 227.

2 *Dillon on Municipal Corporations*, § 161.

3 *City of Jonesboro v. Cairo etc. R. R. Co.* 110 U. S. 192; *Wells v. Supervisors*, 102 U. S. 625; *East Oakland v. Skinner*, 94 U. S. 255; *Kenicots v. Supervisors*, 16 Wall. 452; *Thompson v. Lee County*, 3 Wall. 327; *Gelpecke v. Dubuque*, 1 Wall. 220; *City of Lynchburg v. Slaughter*, 75 Va. 57; *Brodie v. McCable*, 33 Ark. 690; *Barnes v. Lacon*, 84 Ill. 461; *Campbell v. Paris etc. R. R. Co.* 71 Ill. 611; *Pennsylvania R. R. Co. v. Philadelphia*, 47 Pa. St. 189; *Louisville etc. R. R. Co. v. Fairfield*, 51 Vt. 257; *Taylor on Corporations*, § 319; *Cook on Stock & Stockh.* § 90; *Wood's Railway Law*, § 100.

4 Cases cited *supra*. School districts have no power by their trustees to subscribe to the stock of a railway company, and bonds issued

to pay such a subscription are void: *Weightman v. Clark*, 103 U. S. 251. *Cf. Northern Bank v. Porter Township*, 110 U. S. 608.

5 *Dixon County v. Field*, 111 U. S. 83; *Bissell v. Kanakee*, 64 Ill. 249; 21 Am. Rep. 554.

§ 186. **The constitutional power of the legislature to authorize municipal aid.**—While a municipal corporation cannot constitutionally be empowered to lend its aid and credit to an enterprise undertaken solely for private gain,¹ yet it is now well settled that railways, although primarily constructed for private profit, are in the nature of improved highways, and so far to be considered as public works, that, in the absence of any constitutional inhibition, the legislature may authorize the extension of municipal aid to the companies constructing them.² Even where a corporation was organized for the double purpose of building a railway and erecting a cotton compress, the former a public improvement, and the latter a private enterprise, a special tax voted in aid of the construction of the former alone is valid.³ An act of the legislature, authorizing a municipal subscription, will not avail to validate such a contract unless it be duly passed in accordance with all proper constitutional formalities.⁴ If the enabling act be void, bonds issued thereunder are also void.⁵

1 *Cole v. La Grange*, 113 U. S. 1; *Weisner v. Village of Douglass*, 64 N. Y. 91; 21 Am. Rep. 536; *Bloodgood v. Mohawk etc. R. R. Co.* 18 Wend. 965; 31 Am. Dec. 313; *Union Pacific R. R. Co. v. Smith*, 23 Kan. 745. This question, however, and the further inquiry growing out of it as to the distinction between public and private uses, is more properly to be treated in works upon constitutional law, municipal corporations, or stock and stockholders, *q. v.*

2 Cases cited *supra*, n. 1; and *infra*, § 187. *Cf. Bard v. City of Augusta*, 30 Fed. Rep. 906.

3 *McKenzie v. Wooley* (1887), 39 La. An. 944.

4 *Amoskeag National Bank v. Town of Ottawa*, 105 v. Commissioners, 27 Kan. 314; *Cook on Stock & Stockh.*

5 *Gilson v. Town of Dayton*, 123 U. S. 59.

§ 187. **The same subject continued—Conflicting authorities—Weight of opinion.**—Whether, in the absence of an express constitutional inhibition, the legislature may constitutionally confer upon municipal corporations, either by charter or by special act, authority to aid, by gift or by subscription, any enterprise not governmental or strictly public in nature, has been a mooted point. On the one hand, contending against the constitutionality of such grants, are two of the most eminent of American commentators,¹ supported by the decisions of the supreme courts of New York,² a line of cases in Iowa extending from 1858 to 1862,³ and an unbroken line of cases in Michigan.⁴ On the other hand, sustaining the constitutionality of the grants, are the decisions of the New York court of appeals,⁵ the decisions in Iowa prior to 1858 and since 1869,⁶ the decisions of the federal Supreme,⁷ circuit and district courts,⁸ and of the decisions of the courts of last resort in all of the other American States.⁹

1 Dillon on Municipal Corporations, §§ 12, 17, 153; Cooley on Constitutional Limitations, pp. 261, 266.

2 People v. Henshaw, 61 Barb. 409; Sweet v. Hurlburt, 51 Barb. 312; Grant v. Coorter, 21 Barb. 234; Benson v. Albany, 14 Barb. 248; Ex parte Taxpayers of Kingston, 40 How. Pr. 441. Cf. Clarke v. Rochester, 28 N. Y. 605.

3 Stokes v. Scott, 10 Iowa, 166; State v. Wapello, 13 Iowa, 388; Myers v. Johnson, 14 Iowa, 47.

4 People v. Detroit, 28 Mich. 228; 15 Am. Rep. 252; Thomas v. Port Hudson, 27 Mich. 320; Bay City v. State Treasurer, 23 Mich. 499; People v. Salem, 20 Mich. 452; 4 Am. Rep. 400.

5 Lyons v. Chamberlain 36 N. Y. 576; Horton v. Thompson, 71 N. Y. 513; affirmed, 101 U. S. 685; Duaneburgh v. Jenkins, 66 N. Y. 129; People v. Spencer, 53 N. Y. 1; People v. Batchellor, 53 N. Y. 128; People v. Mitchell, 33 N. Y. 531; Starin v. Genoa, 23 N. Y. 433; Bank v. Rome, 18 N. Y. 33.

6 Dubuque v. Dubuque etc. R. R. Co. (1853) 4 Greene, 1; State v. Bissell (1854), 4 Greene, 328; Clapp v. Cedar County (1857), 5 Iowa, 15; 68 Am. Dec. 678; McMillen v. Lee County, 6 Iowa (1853), 391; Stewart v. Polk County, 30 Iowa (1870), 9; McGregor v. Birdsall, 32 Iowa, 149; Jordan v.

Hays, 36 Iowa, 9; Musselins R. R. Co. v. Horton, 36 Iowa, 23; Wapello v. Burlington etc. R. R. Co. 44 Iowa, 585.

7. Knox County v. Aspinwall, 21 How. 539; Dixon County v. Field, 111 U. S. 82; Lester v. Barbour County 100 U. S. 100; Taylor v. Ypsilanti, 105 U. S. 67; Clay County v. Society for Saving 104 U. S. 872; Hickory v. Elery 13 U. S. 423; Lock Creek v. Strong 9 U. S. 271; Railroad v. County of Clark 1 Wall 67; Kendall v. Johnson, 9 Wall 477; Beloit v. Morgan 7 Wall 61; Lee County v. Rogers 7 Wall 181; Supervisors v. Schenck 5 Wall 77; Campbell v. Knapton 5 Wall 194; Von Hoffman v. Quaker 4 Wall 530; Mitchell v. Boardman 4 Wall 270; Rogers v. Burlington 3 Wall 54; Thompson v. Lee County 3 Wall 327; Havemeyer v. Iowa County 3 Wall 274; Van Houten v. Madison, 1 Wall 291; Seybert v. Pittsburgh 1 Wall 273; Mercantile v. Hackett, 1 Wall 81; Gelpcke v. Duane 1 Wall 17; Curtis v. Board County, 24 How. 435; Amey v. Mayor, 24 How. 360, 371; Zabarsky v. Railroad Co. 23 How. 391.

8. Bibbey v. Moblie, 3 Woods, 435; United States v. New Orleans, 2 Woods, 120; Long v. New London, 2 Elm. 539.

9. In Virginia. Gollin v. Crump, 8 Leigh, 120. In West Virginia. Goodborn v. County 1 W. Va. 308. Adams v. Veterans R. R. Co. 10 Bush, 1. In Kentucky. Madison. Graham 2 Met. Ky. 6; Shelby County v. Cumberland etc. R. R. Co. 1 Bush 20; Saxe v. Madison etc. R. R. Co. 13 Min. R. 1; Tallot v. Kent 5 Min. R. 53. In Missouri. State v. Irons County 51 Mo. 510; State v. Jackson County 51 Mo. 50; Oange Valley etc. R. R. Co. v. Morgan County 51 Mo. 16; Hunt v. Shivers 51 Mo. 522; State v. Linn County 41 Mo. 4. In North Carolina. Voss v. Commissioners of Oxford 37 N. C. 257; Holly Commissioners 67 N. C. 367; Taylor v. Newbern 2 Jones Eq. In Tennessee. Winston v. Tennessee etc. R. R. Co. 57 Tenn. 6; Cox v. payers v. Tennessee etc. R. R. Co. 13 Tenn. 320. In Arkansas. Jacksonport v. Watson 31 Ark. 74; Mississippi etc. R. R. Co. v. Council, 23 Ark. 381; English v. United Co. 26 Ark. 43. In South Carolina. Cooper v. Charleston 1 Rich. 136. In Georgia. Towns v. Sugar etc. of Dougherty County 23 Ga. 6; Wilcox v. Macon 20 Ga. 275. In Alabama. Opoka v. Daniel 5 Ala. 216; G. Co. v. M. Co. etc. R. Co. 3 Ala. 41; Beechey Mayor 21 Ala. 501. In Mississippi. New Orleans etc. R. R. Co. v. McDaniel 53 Miss. 24; Strickland v. Railroad Co. 27 Miss. 298. In Florida. Clatter v. Leon County 2 Fla. 21. In Texas. San Antonio v. Gould 34 Tex. 4; San Antonio v. Leon 2 Tex. 405; San Antonio v. Jones 28 Tex. 19. In Louisiana. Parker v. Sengelin, 11 La. An. 629; Police Jury v. McDonough 5 La. An. 311. In Pennsylvania. Argyle v. Hager 21 Pa. St. 17; 50 Am. Dec. 100; County v. Bri. Co. 67 Pa. St. 365; Commonwealth v. M. Williams 11 Pa. St. 11. In Massachusetts. Supervisors v. Wicksford etc. R. Co. 1, Mass. 460. In Maine. Stevens v. Anson 73 Me. 4; Augusta Bank v. Augusta 41 Me. 547. In Vermont. Barnstable v. Park 5 Vt. 3. National Bank v. Concord 150 Vt. 227. In New Hampshire. Curry v. Kean, 5 N. H. 511. In Connecticut. Douglas v. Chatham 4 Conn. 211; Bridgeport v. Hartsford R. R. Co. 15 Conn. 43. In California. Stockton etc. R. R. Co. v. Stockton, 41 Cal. 147; Sam. V. Co. v. R. Co. v. Napa County, 30 Cal. 435; People v. Co. 27 Cal. 3; Roberts v. L. 3 Well, 21 Cal. 379. In Colorado. People v. Public County 100 Col. 300. In Illinois. Chicago etc. R. R. Co. v. Aurora, 9 Ill. 25; Quincy etc. R. R. Co. v. Morris, 53 Ill. 40; Shaw v. Den 15 5 Ill. 4. In Indiana. Peed v. Mullikan, 70 Ind. 80; Brew v. Gibson County 73 Ind. 543; City of Aurora v. West, 0 Ind. 74. In Kansas. Leavenworth County v. 31 Kan. 7; Kan. 47; 12 Am. R. 42; Leavenworth etc. R. R. Co. v. Douglass County 18 Kan. 13; City of Atchison v. Butler 3 Kan. 104. In Minnesota. State v. Clark 23 Minn. 423; Davidson v. Ramsey County, 18 Minn. 482. In Nebraska. Reiman v. Channing etc. R. R. Co. 7 Neb. 310; Hallenbeck v. Hahn, 2 Neb. 377. In Nevada—

Gibson v. Mason, 5 Nev. 283. **In Ohio**—Walker v. Cincinnati, 21 Ohio St. 14; 8 Am. Rep. 24; Cincinnati etc. R. R. Co. v. Clinton County, 1 Ohio St. 77. **In Wisconsin**—Lawson v. Milwaukee etc. R. R. Co. 33 Wis. 383; S. C. 30 Wis. 597; Clark v. Janesville, 10 Wis. 136. For a full collection of cases on this point, see Cook on Stock & Stockh. § 91, notes 1 and 2.

§ 188. **Power to authorize aid to railways outside of State or county.**—The courts have not been often called upon to determine whether the legislature may constitutionally authorize a municipal corporation to extend aid to railway companies not within the territorial limits of the State or county. But where the question has arisen, the constitutionality of such enabling acts has been usually sustained, whenever it appeared that by the construction of the railway some advantage would accrue to the municipality.¹ Upon this principle, an act enabling a city to aid a railway ending near it on the other side of a river forming the boundary line of the State, has been upheld.² But the legislature may restrict municipal aid to railways within the State or county.³ Thus, where the enabling act authorized aid to any railway by a county *through or in which it should be located*, bonds issued to aid a railway which was not located through or in the defendant county, are illegal, and payment cannot be enforced even by a *bona-fide* holder, although they appeared regular on their face; for the issue in such a case is entirely without authority of law.⁴

1 Otoe County v. Baldwin, 111 U. S. 1; Council Bluffs etc. R. R. Co. v. Otoe County, 16 Wall. 667; Quincy etc. R. R. Co. v. Morris, 84 Ill. 410; Copes v. Charleston, 10 Rich. 491. *Contra*, Allen v. Louisiana, 103 U. S. 83. *Cf.* White v. Syracuse etc. R. R. Co. 40 Barb. 559, upholding the constitutionality of the New York statute authorizing railway companies to subscribe for the stock of the Great Western Railway, Canada West.

2 Moulton v. Evansville, 25 Fed. Rep. 382.

3 State v. Hancock County, 11 Ohio St. 183; S. C. 12 Ohio St. 593.

4 State v. Hancock County, 11 Ohio St. 133; S. C. 12 Ohio St. 596.

§ 189. **Whether the legislature may compel municipalities to subscribe.**—While it is competent for the legislature to authorize municipal aid to railway enterprises, it is in general conceded that there is no constitutional power to compel a town, city or county to enter into a subscription for that purpose;¹ although in California it has been held that the State may compel a municipal corporation to subscribe to the capital stock of a railway company, and to issue bonds in payment thereof.²

1 *People v. Bachelor*, 53 N. Y. 128; *Cairo etc. R. R. Co. v. Sparta*, 77 Ill. 505. Cf. *Queensburg v. Culver*, 19 Wall. 82.

2 *Napa Valley R. R. Co. v. Napa County*, 30 Cal. 435.

§ 190. **Express grant must be shown—Effect of statute a question of law.**—A statute authorizing a railway to *receive* subscriptions from any municipality does not by implication authorize those municipalities which would not otherwise have the authority, to *make* subscriptions to the railway.¹ If under cover of authority to issue bonds for one purpose they be issued for another, they will be void even in the hands of a *bona-fide* holder.² The authority, therefore, to subscribe to the stock of a railway company can be derived only from express legislative grant, either in the original charter of the municipality or in a special enabling act; and the validity of the subscription and of the municipal bonds issued in payment thereof, depends upon such an express grant of authority being shown;³ although there is a case in which a statute not expressly granting the authority, but providing that the councils of cities of a certain class shall take all needful steps to protect the interests of the city in any railroad leading from or

towards the same, has been construed to authorize the cities to become interested in railroad enterprises.⁴ A similar decision is found in the reports of South Carolina, holding that a general power conferred upon a city by its charter to make such by-laws as shall appear "requisite and necessary for the security, welfare and convenience of said city," authorized subscriptions to railways either within or without the State.⁵ And in another case it has been held, that where its charter authorizes a railway company to receive a subscription from a county without a vote of the people, it will operate to repeal a prior special act requiring a vote of the tax-payers in favor of the subscription—at least so far as to validate the bonds issued in payment thereof in the hands of *bona-fide* holders.⁶ Power conferred by statute to extend aid to a designated road "and" a certain other road, authorizes the extension of aid to *either* road.⁷ Notwithstanding a statute providing that "no general laws as to powers of cities shall be construed to affect the charter or laws of cities organized under special charters,"⁸ it has been held that a general act enabling any township, incorporated town or city to aid in the construction of railways, applies to a city organized under a special charter.⁹ The power to borrow money includes the power to issue bonds in payment, and if the bonds may be issued to the lender they may be issued for sale by the town in the market.¹⁰ Whether an enabling act is sufficient to validate the acts done under its supposed authority is a question of law for the court to determine, and not a matter of fact for the jury.¹¹

- 1 *Pitzman v. Freeburg*, 92 Ill. 111.
- 2 *Lewes v. Shreveport*, 3 Woods, 205. See, however, *Singer Manuf. Co. v. Elizabeth*, 42 N. J. 249.
- 3 *Lewes v. City of Shreveport*, 108 U. S. 282; *Ottawa v. Carey*, 108 U. S. 119; *Allen v. Louisiana*, 103 U. S. 80; *March v. Fulton*, 10 Wall. 676; *Commercial Bank v. Iola*, 2 Dill. 353; *Welch v. Post*, 89 Ill. 471; *Leavenworth County v. Miller*, 7 Kan. 479; 12 Am. Rep. 425; *Sharpless v. Mayor*, 21 Pa. St. 147; 53 Am. Dec. 759; *LaFayette v. Cox*, 5 Ind. 33; *Dillon on Municipal Corporations*, § 161; *Wood's Railway Law*, § 100; *Cook on Stock & Stockh.* § 90.
- 4 *Bard v. City of Augusta*, 30 Fed. Rep. 906.
- 5 *Copes v. Charleston*, 10 Rich. 491. Cf. *City Council v. Baptist Church*, 4 Strob. 308, 308.
- 6 *Burr v. Chareton County*, 2 McCrary, 603.
- 7 *First National Bank v. Concord*, 50 Vt. 257.
- 8 *Iowa, Laws of 16th Gen. Assembly*, ch. 116.
- 9 *Bartemeyer v. Rohlf's* (1887), 71 Iowa, 582.
- 10 *Merrill v. Monticello*, 22 Fed. Rep. 634.
- 11 *Post v. Supervisors*, 105 U. S. 667.

§ 191. **Distinction between authority to aid and authority to issue bonds.**—A grant of power or a vote to extend municipal aid to a railway and to levy a tax for the payment of the money donated or subscribed, does not by implication authorize the municipality to borrow money for that purpose nor to issue bonds. If bonds be issued upon the supposed authority of such a vote they will be illegal; and even levying a tax to pay the interest upon them will not estop the municipality from denying that it had authority to issue them.¹ Even a clause in a statute empowering a municipal corporation to subscribe for railway stock upon "such terms and conditions as they may stipulate and agree upon," has been held not to imply a power to issue bonds to meet the payment of the subscription.² But in the absence of constitutional provisions making such a distinction either directly or by implication, there are cases holding that authority to extend municipal aid authorizes by implication the

borrowing of money or the issue of bonds. "Both," it is said, "are aimed at the same object, securing a public advantage; *both are equally burdensome to the taxpayers.*"³ But in a recent case in the federal Supreme Court, construing the code of Tennessee authorizing subscriptions for stock and the levy of taxes for payment thereof;⁴ and also two other acts, the one authorizing towns to lend their credit and take stock, and impose taxes for corporate purposes,⁵ and the other authorizing the issue of bonds for the purpose of paying outstanding and matured liabilities;⁶ it was decided that under none of these statutes is a town authorized to issue negotiable bonds in aid of a railway enterprise, either directly or in payment of subscriptions to its capital stock.⁷ Where a statute granting authority to subscribe and to levy a tax in payment thereof provided further that the subscription and voting of taxes should be governed by a general act relating to such matters, and the general act referred to authorized the issue of bonds, it was held that the two statutes construed together authorized the issue of bonds.⁸

1 Norton v. Town of Dyersburg (1888), 127 U. S. 160; Daviess County v. Dickinson, 117 U. S. 657, 663; Ottawa v. Carey, 108 U. S. 110; Wells v. Supervisors, 102 U. S. 625; Town of Concord v. Robinson, 121 U. S. 165, construing Ill. Priv. Laws, 1867, p. 842; Katzenberger v. City of Aberdeen, 121 U. S. 172; Marsh v. Fall County, 10 Wall. 676; Pulaski v. Gilmore, decided by the Supreme Court of Tennessee and published in 21 Fed. Rep. 870; Milan v. Railroad Co. 11 Lea, 329; Schaffer v. Bonham, 95 Ill. 368. Cf. Kelly v. Town of Milan, 127 U. S. 133; Claiborne v. Brooks, 111 U. S. 400.

2 Katzenberger v. City of Aberdeen, 121 U. S. 172.

3 Railroad Co. v. County of Otoo, 16 Wall. 674; Olcott v. Supervisors, 16 Wall. 91; Town of Queensbury v. Culver, 19 Wall. 91. But see Norton v. Town of Dyersburg (1888), 127 U. S. 160.

4 Tenn. Code (1857-58), §§ 1142-1161.

5 Tenn. Act of Jan. 23, 1871, § 1.

6 Tenn. Act of March, 23, 1873, § 1.

7 Kelley v. Town of Milan, 127 U. S. 133.

8 Henderson v. Jackson County, 2 McCrary, 615.

§ 192. **Requirements of enabling act to be strictly followed.**—The power of a municipality to extend aid to railway enterprises being, as shown in a preceding section,¹ derived only from legislative grant, the provisions of the enabling act must be complied with, both substantially and literally, in respect to every essential requirement;² such, for example, as relate to petitions of taxpayers to the municipal authorities to make the subscription or to call an election;³ the calling of the meeting or election by the proper officials,⁴ and due posting of notice thereof for the time specified;⁵ the manner of conducting the election;⁶ the making of the subscription by the authorized agents;⁷ the issue of bonds by the proper municipal authorities,⁸ and the time and place of payment.⁹ And if the statute require the unanimous concurrence of the mayor and the full board of aldermen, as shown by an entry to that effect upon the minutes of the board, signed by each member, even a *bona-fide* holder cannot maintain a bill to enforce payment, unless the requirement has been strictly obeyed; for all such restrictions are imposed to protect the city from an abuse or an injudicious exercise of the power conferred.¹⁰ Carrying the rule of strict construction to an extreme, it has been said that a provision of an enabling act submitting the question to the people at “a regular town meeting,” is not sufficiently complied with by the vote being taken at a special meeting called for the purpose.¹¹ But this decision is justly questioned by an eminent authority upon the ground that it places a forced construction upon the word “regular,” the true import of which, unless varied by local usage, con-

veying the idea of a true compliance with the legal requirements respecting the calling of such meetings, rather than distinguishing between meetings especially called and those held at stated intervals.¹²

1 See *supra*, § 185.

2 *Anderson County Commissioners v. Beal*, 113 U. S. 227; *Carroll County v. Smith*, 111 U. S. 536; *Hoff v. Jasper County*, 110 U. S. 53; *Bissell v. Spring Valley Township*, 110 U. S. 162; *Howard County v. Boonsville etc. Bank*, 108 U. S. 314; *Hawley v. Fairbanks*, 108 U. S. 543; *Minasha v. Hazard*, 102 U. S. 81; *Buchanan v. Litchfield*, 102 U. S. 278; *Bates County v. Winters*, 97 U. S. 83; *McClure v. Town of Oxford*, 94 U. S. 429; *Horton v. Town of Thompson*, 71 N. Y. 513; not followed, however, by the federal court in *Thompson v. Perrine*, 103 U. S. 806; *Merritt v. Portchester*, 71 N. Y. 309; 27 Am. Rep. 47; *People v. Smith*, 45 N. Y. 772; *Chicago etc. R. R. Co. v. Mallory*, 101 Ill. 503; *Cairo etc. R. R. Co. v. Sparta*, 77 Ill. 505; *George v. Oxford*, 16 Kan. 72; *Hamlin v. Meadville*, 6 Neb. 227.

3 Cases cited *infra*, § 205.

4 *Bowling Green etc. R. R. Co. v. Warren County*, 10 Bush, 711; *Jacksonville etc. R. R. Co. v. Virden*, 104 Ill. 339; *Town of Windsor v. Hallett*, 97 Ill. 402; *County of Richland v. People*, 3 Bradw. 210. See, however, *Sauerhering v. Iron Ridge etc. R. R. Co.* 25 Wis. 417; *Commissioners v. Baltimore etc. R. R. Co.* 37 Ohio St. 205.

5 *Harding v. Rockford etc. R. R. Co.* 65 Ill. 90; *Packard v. Jefferson County*, 2 Colo. 338. Cases cited *infra*, § 206. Cf. *Supervisors v. Gailbraith*, 99 U. S. 214; *Wells v. Pontiac County*, 102 U. S. 625; *Lincoln v. Cambria Iron Co.* 103 U. S. 412; *Williams v. Roberts*, 88 Ill. 11.

6 *Chicago etc. R. R. Co. v. Mallory*, 101 Ill. 503. *Infra*, § 206.

7 *Infra*, §§ 222, 223.

8 *Infra*, §§ 222, 223.

9 *Infra*, § 225.

10 *Wetumpka v. Wetumpka Wharf Co.* 63 Ala. 611.

11 *Pana v. Lippencott*, 2 Bradw. 466.

12 *Wood's Railway Law*, § 101.

§ 193. Non-compliance with statute as to mere matters of form.—Non-compliance with the terms of the statute with respect to matters not of essence, but of form, does not render a subscription void.¹ For example, in a recent case where the enabling act provided that the clerk of the election should certify the result of the election, together with the time, terms and conditions upon which the tax when collected should be paid to the railroad company, and also provided that the order of the board

of supervisors making the levy should indicate upon what conditions the tax should be paid to the company, and the clerk made out his certificate as required, but the supervisors, having this certificate before them, failed to direct in their order upon what terms the railroad should be entitled to the tax, it was decided that this was not an essential omission, and that it did not affect the validity of the levy, especially as the certificate of the clerk had made all the stipulations and conditions of record.² So a mere inaccuracy in the form of the bonds will not render them invalid; as where the statute required them to be made payable to "the order of the president and directors of the company," their being made payable to the company, "its assignee or bearer," did not impair their validity.³ In another late case, it was decided that an act authorizing the issue of interest-bearing bonds in aid of railway construction payable not exceeding twenty years from their date, was sufficiently complied with by an issue of bonds dated April 17th, 1869, reciting that they were payable twenty years from July 1st, 1869, and bearing interest from the latter date, the interval between the date of issue and July 1st being only a reasonable allowance of time for the issue and delivery of the bonds and putting them in circulation.⁴ Again, where the statute authorized the bonds to bear interest at the rate of eight per centum, and they were issued as paying twelve, they were invalid only as to the additional four per centum.⁵ In New York, however, it has been said that the courts will not undertake to say that any requirement of the enabling statute is immaterial; that every step pre-

scribed must be taken, carrying out not only the spirit of the statute but the letter also.⁶

1 *Paner v. Bowler*, 107 U. S. 529; *Draper v. Springport*, 104 U. S. 501; *County of Jasper v. Ballou*, 103 U. S. 745; *Commissioner v. Thayer*, 94 U. S. 631; *Solon v. Williamsburgh Savings Bank*, 35 Hun. 1; *Elmendorf v. New York*, 25 Wend. 693; *Jussen v. Lake County*, 95 Ind. 567; *Beifast etc. R. R. Co. v. Brooks*, 6 Me. 568; *Lippincott v. Paner*, 92 Ill. 24; *New Haven etc. R. R. Co. v. Chatham*, 42 Conn. 455. *Cf. Walnut v. Wade*, 103 U. S. 633; *Ganse v. Clarksville*, 5 Dillon, 165; *S. C. 1 McCreary* 76; *Burr v. Chariton County*, 2 McCrary, 603; *Henderson v. Jackson County*, 2 McCrary, 615; *Thomas v. City of Richmond*, 12 Wall. 349; *Supervisors v. Schenck*, 5 Wall. 772; *Oneida Bank v. Ontario Bank*, 21 N. Y. 400; *People v. Town of Santa Anna*, 67 Ill. 57; *People v. Town of Laenna*, 67 Ill. 65; *Clarke v. Hancock County*, 27 Ill. 205; *Johnson v. Stark*, 24 Ill. 75.

2 *Bartemeyer v. Rohlf*, 71 Iowa, 582. *Cf. Chicago etc. R'y Co. v. Shea*, 67 Iowa, 728, where, after a railroad had been built, an injunction to restrain the collection of a tax voted in its aid, asked for upon the ground that the certificate made by the clerk to the county auditor did not show all the conditions of the vote except by reference to a copy of the notice of the election attached thereto, was refused.

3 *Maddox v. Graham*, 3 Met. (Ky.) 146. *Acc. Calhoun County v. Galbraith*, 99 U. S. 214.

4 *Dows v. Town of Elmwood*, 34 Fed. Rep. 114.

5 *Quincy v. Warfield*, 25 Ill. 317; 79 Am. Dec. 330.

6 *People v. Smith*, 45 N. Y. 772; *People v. Hurlburt*, 46 N. Y. 110. But see *Elmendorf v. New York*, 25 Wend. 693; *Solon v. Williamsburgh Bank*, 35 Hun. 1. In the latter case the statute required the bonds to be under seal, but the failure to comply therewith did not render them invalid.

§ 194. Remedial statutes and votes of ratification.—A subsequent vote of the people directing the municipal authorities to treat bonds illegally issued as properly authorized by law, for the purpose of effecting a settlement with the holders, will cure all defects and bar any future action as to their validity; but no ratification by the municipality itself is sufficient to render valid such as have been issued entirely without authority of law.¹ The legislature, however, where it would have had the constitutional power originally to authorize the making of a subscription or issue of the bonds, may ratify the action of the municipality taken without its authorization.² But in Illinois such special remedial acts are unconstitutional.³

In New York, also, a leading case in its highest court has declared curative legislation of this character contrary to the constitution;⁴ but later cases in the "Supreme Court"⁵ of New York have failed to follow the case referred to above;⁶ and it has been repudiated in the federal Circuit Court for the Southern District of New York,⁷ and in the Supreme Court of the United States.⁸

1 Treadway v. Schnauber, 1 Dak. 236; and cases cited *infra*, § 237.

2 National Bank v. Yankton County, 101 U. S. 129; Anderson v. Santa-Anna, 116 U. S. 365.

3 Gaddis v. Richland County, 92 Ill. 114; William v. Roberts, 88 Ill. 11; Marshall v. Selliman, 61 Ill. 218; Richland County v. People, 3 Bradw. 210.

4 Horton v. Thompson, 71 N. Y. 520, where the remedial statute approved in Williams v. Duaneburgh, 66 N. Y. 129, was declared unconstitutional.

5 The learned reader should bear in mind that the "Supreme Court" of New York is an inferior court, occupying in the judiciary of that State a position about the same as that held by the circuit courts in many of the States. The name is often misleading.

6 Horton v. Thompson, 7 Hun. 452; Rogers v. Smith, 5 Hun. 475

7 Perrine v. Thompson, 17 Blatchf. 18.

8 Thompson v. Perrine, 106 U. S. 589, where it was held that the decision in Horton v. Thompson, 71 N. Y. 520, declaring the remedial statute unconstitutional, should not prejudice the rights of a *bona-fide* holder, who had instituted his action against the municipality before the case in which said decision was rendered had been commenced.

§ 195.—The same subject continued.—Accordingly, on the whole, the better opinion seems to be, that the legislature may cure defects, when the manner in which the subscription was voted and made and the form in which the bonds were issued was such as would have been valid, if it had been so directed by the enabling act;¹ for if the legislature have the power to determine originally the manner in which the municipality shall act, it would seem reasonable to concede that it likewise has power to remit a part of the conditions which it has

itself imposed.² The decisions in the United States Supreme Court to the contrary³ do not express the prevailing doctrine of the court, but simply follow the decisions of the appellate court in the State in which the case arose.⁴ It has been said that conditions imposed by the enabling act may be waived by the legislature even during litigation.⁵ The extent of remedial legislation is not, however, without its limitations. As, for example, when certain terms or conditions have been prescribed by the enabling act because so required by the constitution of the State, and the municipality has failed to conform to the statute in these particulars, there remains no power in the legislature to cure the defect. And conversely if the legislature under the constitution had no power to authorize the issue of bonds in the manner adopted by the municipality, it cannot, of course, legalize an issue so made.⁶ Neither can the legislature, by an act purporting to cure irregularities only, validate bonds issued *ultra vires*.

1 Grenada County v. Brogden, 112 U. S. 261; Thompson v. Perrine, 105 U. S. 589; Dows v. Town of Elmwood, 34 Fed. Rep. 114; Leslie v. Urbana, 2 Biss. 435; Duaneburgh v. Jenkins, 57 N. Y. 188, restricting People v. Batchellor, 51 N. Y. 131, to the circumstances of that particular case. Cf. Hays v. Holly Springs, 114 U. S. 120; Bolles v. Town of Brimfield, 120 U. S. 759.

2 Duaneburgh v. Jenkins, 57 N. Y. 188, where the court said: "As it might have authorized action in this way and on these conditions by the town originally, I see no objection to giving effect to its ratification of the action of the town, and holding its consent thus expressed effectual. *Acc.* Williams v. Duaneburgh, 66 N. Y. 129; People v. Mitchell, 35 N. Y. 522; Gelpecke v. Dubuque, 1 Wall. 253; Thompson v. Lee County, 3 Wall. 37; Beloit v. Morgan, 7 Wall. 619; St. Joseph v. Rogers, 16 Wall. 663; Cooper v. Thompson, 13 Blatchf. 434.

3 See Elmwood v. Morey, 92 U. S. 239.

4 Wood's Railway Law, § 113, note.

5 Duaneburgh v. Jenkins, 57 N. Y. 177. See, however, Columbus etc. R. R. Co. v. Grant County, 65 Ind. 427.

6 Elmwood v. Morey, 92 U. S. 239.

7 Williamson v. Keokuk, 44 Iowa, 88; Wood's Railway Law, § 113. It

has been deemed necessary to invoke the opinion of the federal Supreme Court on the question whether a curative act entitled "An act to legalize certain aids heretofore voted and granted to aid in the construction of" a certain road, would operate to cure defects in aids voted and granted subsequently to the passage of the act. The court thought that it would not: *Town of Concord v. Robinson*, 121 U. S. 165, construing Ill. Priv. Laws, 1869, p. 355, Act of Feb. 26, 1869.

§ 196. Prospective effect of general enabling acts.—An act authorizing a city to subscribe to a certain railway and "to any other railroad company duly incorporated and organized," extends to companies incorporated and organized after the passage of the act as well as to those then in existence,¹ and unless the enabling act restricts the extension of aid to a particular railway company, a municipal subscription may be made to the stock of companies thereafter incorporated, as well as to one which is already in existence.² A statute authorizing "any incorporated town or city" in a county to extend aid to railway enterprises applies equally to towns or cities incorporated after its enactment as to those already incorporated.³ But a subscription voted before the incorporation of a municipality, although subsequently ratified by its officers after its charter became operative, is a nullity.⁴

1 *James v. Milwaukee*, 13 Wall. 159; *Railroad Co. v. Falconer*, 103 U. S. 821.

2 *Davies County v. Huldekoper*, 93 U. S. 98; *Cass County v. Johnson*, 95 U. S. 36; *Stebbins v. Pueblo County*, 2 McCrary, 196.

3 *Lewis v. Clarendon*, 5 Dill. 329.

4 *Berliner v. Waterloo*, 11 Wis. 378; *Rochester v. Alfred Bank*, 13 Wis. 43; 80 A. n. Dec. 716; *Clark v. Janesville*, 13 Wis. 414; *Clarke v. Zanesville*, 10 Wis. 136; *Winchester etc. Co. v. Clarke*, 3 Met. (Ky.) 140; *Wood's Railway Law*, § 191. As to the validity of bonds issued by a municipality not organized at the time required by its charter, see *Macon County v. Shores*, 97 U. S. 96.

§ 197. Repeal of enabling acts.—Where the law under which a petition had been presented to the commissioners asking that an election be ordered

to vote upon the question of subscription to a railway, was repealed after the presentation of the petition but before the election had been ordered, the repealing act providing that it should not affect any election pending at or prior to its taking effect, it was held that the wrongful act of the commissioners in delaying the order to hold the election would not defeat the rights of the taxpayers to proceed with the election, nor invalidate its result.¹ In a case in which an enabling act was repealed after a railway-aid tax had been voted, and the railroad had been transferred to another company under a perpetual lease, by which the larger part of the money expended in construction was repaid, and which showed no intention to transfer the taxes and imposed no obligation upon the lessor to expend any further amount, and where neither the lessor nor the lessee had made any expenditure relying upon the taxes, by appropriating any money to be obtained therefrom to any specific purposes, it was decided that the tax was void and that its collection might be enjoined.²

1 *State v. County of Reno* (1838), 38 Kan. 317.

2 *Barthel v. Meader* (1887), 72 Iowa, 125.

§ 198. **Constitutional inhibitions.**—By the constitutions of many of the American States no town, county or municipality can give money or property to any corporation having for its object a dividend of profits,¹ or to any individual or corporation whatever,² or become a stockholder or bondholder in such private corporations.³ As to becoming a stockholder, however, an exception is made in Nevada in favor of railways.⁴ But in the prohibition in

the constitutions of Connecticut and Nebraska, railway corporations are expressly included.⁶ In some States a municipality may give or lend its property or credit, or own stock, upon a vote of the electors under authority of law,⁷ or on a two-thirds vote of the electors under authority of the legislature,⁸ or on a three-fourths vote of the electors,⁹ or by act of legislature approved by the next legislature after publication in the locality interested.¹⁰

1 Stimson's Am. Stat. Law, (Jan. 1, 1886), § 345, citing the constitution of New Hampshire.

2 Stimson's Am. Stat. Law (Jan. 1, 1886), § 345, citing the constitutions of N. Y., N. J., Pa., Ohio, Ind., Ill., Wis., Mo., Ark., Tex., Cal., Or., Colo., Ga., Ala., Fla., and La. See also N. Y. Amend. Const. Jan. 1, 1875; Dodge v. County of Platte, 52 N. Y. 218; People v. Fort Edward, 70 N. Y. 28.

3 Stimson's Am. Stat. Law (Jan. 1, 1886), § 345, citing the constitutions of N. H., Conn., N. Y., N. J., Pa., (Del.), Ill., Neb., Tenn., Mo., Ark., Tex., Cal., Or., Nev., Colo., Ga., Ala., Mass., Fla., La. See also Pa. Const. Amend. 1857, § 7 art. 2; Pennsylvania R. R. Co. v. Philadelphia, 47 Pa. St. 189; Ill. Const. 1870, Oneill v. People (1888), 23 Ill. 439; Louisville v. Savings Bank, 134 U. S. 463; Harter v. Kernochan, 103 U. S. 532; Fairfield v. County of Grafton, 130 U. S. 47; Concord v. Portsmouth Savings Bank, 92 U. S. 625; County of St. Louis v. Rockingham etc. Bank, 92 U. S. 631; Chicago etc. R. R. Co. v. Peckney, 74 Ill. 277; Ind. Const. art. 10, § 19, Aspinwall v. Jo Davian etc., 22 Ill. w. 264; Brokaw v. Board of Commissioners, 73 Ind. 543; John v. Cincinnati etc. R. R. Co., 35 Ind. 533; Lafayette etc. R. R. Co. v. Geyer, 34 Ind. 18; Ohio Const. art. 8, § 6, Wiscaver v. Atkinson, 37 Ohio St. 80; Walker v. Cincinnati, 21 Ohio St. 14; 8 Am. Rep. 24; Fowdick v. Perryburg, 14 Ohio St. 473; Thompson v. Kelly, 2 Ohio St. 647; Case v. Dillon, 2 Ohio St. 607; Mo. Const. art. 11, § 14, County of Schuyler v. Thomas, 64 U. S. 179; County of Macon v. Shores, 97 U. S. 272; County of Ray v. Vansyde, 96 U. S. 675; County of Scotland v. Thomas, 94 U. S. 682; Smith v. County of Clark, 54 Mo. 58.

4 Stimson's Am. Stat. Law (Jan. 1, 1886), § 345.

5 Conn. Const. Amend. 25; Neb. Const. art. 14, § 2.

6 Neb. Const. art. 14, § 2.

7 Miss. Const. art. 12, § 14; Hayes v. Holly Springs, 114 U. S. 129; Grenada County v. Brogden, 113 U. S. 261; Supervisors v. Gallbreath, 90 U. S. 214.

8 Tenn. Const. art. 2, § 29.

9 Md. Const. art. 3, § 51; Stimson's Am. Stat. Law (Jan. 1, 1886), § 345.

§ 199. Construction of constitutional inhibitions.
Inhibitions of municipal subscription are construed

to prohibit the extension of aid by way of donation also.¹ These inhibitions, however, have in many instances been practically annulled by a too liberal construction of the courts.² A constitutional restriction upon the power of the State to lend its aid to the construction of railways does not extend to the municipalities of the State;³ nor is a restriction upon counties applicable to cities.⁴ Whether special authority to a municipality to borrow money to pay for stock subscribed to a railway company will impliedly repeal, *pro tanto*, existing charter limitations upon the rate of taxation, is a question depending upon construction, and in relation to which the courts have differed. But the strong inclination of the federal Supreme Court seems to be in favor of that construction which restricts such limitations to the exercise of the power of taxation in the ordinary course of municipal action."⁵

1 *Fairfield v. Gallatin Co.* 100 U. S. 47; *Lippincott v. Pana*, 92 Ill. 24; *Middleport v. Aetna Insurance Co.* 84 Ill. 562; *Chicago etc. R. R. Co. v. Pinckney*, 74 Ill. 277. *Cf.* *County of Moultrie v. Fairfield*, 105 U. S. 307.

2 See *City of Savannah v. Kelly*, 108 U. S. 184; *Walker v. Cincinnati*, 21 Ohio St. 14; 8 Am. Rep. 24; 11 Am. Law Reg. (N. S.) 346; *Bank of Lawrence v. Barber*, 24 Kan. 534.

3 *Slack v. Marysville etc. R. R. Co.* 13 Mon. B. 1; *New Orleans v. Graihle*, 9 La. An. 561; *Cass v. Dillon*, 2 Ohio St. 607; *Thompson v. Kelly*, 2 Ohio St. 647; *Robertson v. Rockford*, 21 Ill. 451; *Prettyman v. Tazewell County*, 19 Ill. 403; 71 Am. Dec. 230; *Pattison v. Supervisors*, 13 Cal. 175; *Clark v. Jaresville*, 10 Wis. 133; *Bushnel v. Beloit*, 10 Wis. 195; *Leavenworth County v. Miller*, 7 Kan. 479; 12 Am. Rep. 425. *Cf.* *Bay City v. State Treasurer*, 23 Mich. 499; *Pitzman v. Freeburgh*, 92 Ill. 111.

4 *Thompson v. City of Peru*, 29 Ind. 305.

5 *Dillon on Municipal Corporations*, § 162, citing *Butz v. Muscatine*, 8 Wall. 575. *Contra*, *Clark v. Davenport*, 14 Iowa, 494; *Learned v. Burlington*, 2 Am. Law Reg. (N. S.) 394 and note; *Leavenworth v. Norton*, 1 Kan. 432; *Barnes v. Atchison*, 2 Kan. 254. See Cook on Stock & Stockh. § 92, and cases there cited.

§ 200. Restrictions upon the amount of municipal subscriptions and of taxes levied in payment

thereof.—A subscription beyond the amount authorized is void not merely as to the excess but as to the whole amount.¹ But if, notwithstanding the invalidity of the subscription, bonds be issued in payment thereof by a municipality which is prohibited by law from assuming an indebtedness in excess of a certain percentage of its taxable property, it may not plead, against a *bona-fide* holder, its own violation of the prohibition; for the purchaser is not to be expected to look beyond the statute and the recitals of the bonds and examine into the facts as to the amount of the municipal indebtedness and the amount of the taxable property.² A specified sum authorized to be subscribed in aid of a railway by a special act, will be construed to be in addition to the amount which may be subscribed under a general act authorizing municipalities to raise for railway aid sums of money not in excess of a certain percentage of their taxable property.³ A general law limiting the rate of taxation has no application or effect upon a special charter of a railway by which municipalities were authorized to subscribe for stock, and, by implication, to levy taxes to meet the obligation.⁴ When municipal corporations are authorized by statute to subscribe to “any” railway “not exceeding” a certain amount, the full specified amount may be subscribed to the stock of any number of railway companies.⁵ But the limitation upon the amount of indebtedness to be assumed by a municipal corporation in aid of a railway, imposed by the statute in Kansas,⁶ is construed to restrict the total amount of such indebtedness, and not to define the amount which may be assumed in aid of each of several railways.⁷ When

a town has been authorized to subscribe to a railway company not exceeding a certain amount, it is not limited to the amount of its first subscription, if it be less than the prescribed limit, but may, by subsequent successive votes, subscribe additional sums until the limit be reached.⁸ A restriction of railway-aid taxation to a certain percentage of the taxable property, does not save a delinquent taxpayer from paying the penalty provided by law for delay in payment.⁹ The valuation of the taxable property at the time the vote was taken is the basis upon which to calculate the amount of indebtedness which may be assumed, although another valuation is making and nearly completed.¹⁰

1 Jackson County v. Brush, 77 Ill. 59; Reinman v. Covington etc. R. R. Co. 7 Neb. 310.

2 Marcy v. Oswego, 92 U. S. 637; Humboldt v. Long, 92 U. S. 642; Wilson v. Salamanca, 92 U. S. 499. Acc. Sherman County v. Simons, 109 U. S. 735.

3 Stevens v. Anson, 73 Me. 489.

4 Peoria etc. R'y Co. v. People, 116 Ill. 401.

5 Chicot County v. Lewis, 103 U. S. 164.

6 Kan. Comp. Laws (1835), ch. 84, § 68.

7 Chicago etc. R'y Co. v. Freeman (1828), 39 Kans. 597.

8 Empire v. Darlington, 101 U. S. 87. Cf. Society for Savings v. City of New London, 29 Conn. 174; United States v. Knox County, 2 McCrary.

9 Chicago etc. R'y Co. v. Hartshorn, 30 Fed. Rep. 541. The Code of Iowa, § 45, par. 1, provides that the repeal of a statute shall not affect any penalty incurred thereunder; and it was accordingly held in the case above that the repeal of the general enabling act did not repeal the penalty against delinquent taxpayers incurred at the time of enacting the repealing statute.

10 Hunt v. Hamilton, 25 Kan. 76.

§ 201. **Constitutional and legislative inhibitions not retroactive.**—Constitutional or legislative inhibitions of municipal aid to railway enterprises are wholly prospective, and are of none effect upon previous legislation under which rights have already vested.¹ This is expressly provided by the consti-

tution of Illinois.² But independently of an express exception; such restrictions upon the power of the legislature do not operate to repeal prior enabling acts authorizing municipal aid,³ upon the established principle that special statutes are not repealed by subsequent enactments of a general nature;⁴ or upon the further ground that to give a retroactive force to these inhibitions would be in many cases such an impairing of the obligation of contracts as is prohibited by the federal constitution. The courts will in such cases even take notice of fractions of a day to sustain the validity of municipal bonds.⁵ Accordingly, it is well established that a contract of subscription consummated prior to an alteration in the constitutional or statutory law of the State cannot be impaired by the change;⁶ and that the liability of the municipality to redeem its bonds cannot be impaired by a subsequent repeal of the act under which they were issued. If the municipality refuse to meet its obligations, *mandamus* will lie to compel the levy of a tax and payment of the bonds.⁷ Neither can a statute restricting the taxing power of the municipality, thereby depriving it of the means with which to pay the bonds issued in payment of the subscription, be constitutionally enacted.⁸

1 *Grenada County v. Brogden*, 112 U. S. 261; *Howard County v. Pad-dock*, 110 U. S. 334; *Dallas County v. McKenzie*, 110 U. S. 636; *Louisiana v. Taylor*, 105 U. S. 454; *Railroad Co. v. Falconer*, 103 U. S. 821; *Jarrolt v. Moberly*, 103 U. S. 567; *Durkee v. Board of Liquidation*, 103 U. S. 646; *Wadsworth v. Supervisors*, 102 U. S. 821; *County of Cass v. Gillett*, 100 U. S. 585; *Fairfield v. County of Gallatin*, 100 U. S. 47; *Supervisors v. Galbraith*, 99 U. S. 214; *Schuyler v. Thomas*, 98 U. S. 169; *County of Macon v. Shores*, 97 U. S. 272; *County of Henry v. Nicolay*, 95 U. S. 619; *Scotland County v. Thomas*, 94 U. S. 682; *County of Calloway v. Foster*, 93 U. S. 567; *County of Randolph v. Post*, 93 U. S. 502; *County of Moultrie v. Rockingham etc. Bank*, 92 U. S. 631; *Maenhaut v. New Orleans*, 3 Woods, 1; *Sibley v. Mobile*, 3 Woods, 535; *Nicolay v. St. Clair County*, 3 Dill. 163; *United States v. Jefferson County*, 5 Dill. 310; *Huidekoper v. Dallas County*, 3 Dill. 171; *State v. Clark*, 23 Minn. 422.

municipality by any statements or resolutions operating as an estoppel.³ In the absence of express constitutional inhibition of the power of the legislature to authorize the municipal authorities to subscribe to the stock of railways without submitting the question to the popular vote, there is no general principle of law vesting the right of determining the matter in the people themselves;⁴ nor on the other hand is it any valid objection to the submission of the question to the popular vote, that to do so is an unconstitutional delegation of legislative powers.⁵ Unless the enabling act provide that the question of subscribing shall be submitted to the vote of the people but once, there is no reason for supposing that a second vote may not be taken.⁶

1 *County of Ralls v. Douglass*, 105 U. S. 728; *Thompson v. Lee County*, 3 Wall. 327; *State v. County Court of Sullivan County*, 51 Mo. 522; *State v. Macon County Court*, 41 Md. 453. *Cf. Otose County v. Baldwin*, 111 U. S. 1; *State v. Dallas County*, 72 Mo. 329; *McCallie v. Chattanooga*, 3 Head (Tenn.) 317; *Chicago etc. R. R. Co. v. Aurora*, 99 Ill. 205.

2 *Town of Duanesburgh v. Jenkins*, 57 U. S. 177, 192; *People v. Batchellor*, 53 N. Y. 128, 138; 13 Am. Rep. 480; *Gould v. Town of Sterling*, 23 N. Y. 456; *Starin v. Town of Genoa*, 23 N. Y. 439; *Bank of Rome v. Village of Rome*, 19 N. Y. 20; S. C. 18 N. Y. 38; 75 Am. Dec. 272; *Winter v. City etc. Council of Montgomery*, 65 Ala. 403; *Slack v. Maysville etc. R. R. Co.* 13 Mon. B. 1; *Hobart v. Supervisors*, 17 Cal. 23.

3 *People v. Logan County*, 63 Ill. 374.

4 *Ralls County v. Douglass*, 105 U. S. 728; *Thompson v. Lee County*, 3 Wall. 337; *Long v. New London*, 5 Biss. 539; *McCallie v. Chattanooga*, 3 Head (Tenn.), 317.

5 *Starin v. Genoa*, 23 N. Y. 439; *Gould v. Sterling*, 23 N. Y. 456; *Bank of Rome v. Village of Rome*, 18 N. Y. 33; S. C. 19 N. Y. 20; 75 Am. Dec. 272; *Clark v. Rochester*, 24 Barb. 446; *Grant v. Courter*, 24 Barb. 234; *Cotton v. Leon County*, 6 Fla. 610; *Talbot v. Dent*, 9 Mon. B. 526; *Slack v. Maysville etc. R. R. Co.* 13 Mon. B. 9; *Stein v. Mobile*, 24 Ala. 591; *Police Jury v. McDonough*, 8 La. An. 341; *Louisville etc. R. R. Co. v. Davidson County*, 1 Fneel (Tenn.), 637; 62 Am. Dec. 424; *Moens v. Reading*, 21 Pa. St. 188; *Cincinnati etc. R. R. Co. v. Clinton County*, 1 Ohio St. 77; *Hobart v. Supervisors*, 17 Cal. 23; *Patterson v. Yuba County*, 13 Cal. 175; *Blanding v. Burr*, 13 Cal. 343; *Lafayette etc. R. R. Co. v. Geiger*, 34 Ind. 185.

6 *Supervisors v. Galbraith*, 99 U. S. 214; *Society for Savings v. New London*, 29 Conn. 174.

§ 204. The constitutionality of acts submitting the question to a class of voters.—The con-

stitutionality of acts submitting the question of railway aid to the taxpayers of the municipality has been contested on the ground that it is an improper delegation of power to a class. But it has been decided that the class to be affected by the act may properly be authorized to determine whether or no the burden of taxation shall be assumed.¹ How the consent of a town shall be given is "clearly in the discretion of the legislature;" it may require the majority vote to include male tax-payers or female tax-payers, and to include or exclude such persons as its wisdom may determine."² An act of the Kentucky legislature providing that no railroad-aid tax shall be imposed by the county of Bourbon upon the property of persons residing outside of the city of Paris, the county seat, unless a majority of such residents shall vote in favor of the aid,³ has been held not to confer exclusive privileges such as are forbidden by the constitution of that State,⁴ and that it is not in violation of the constitutional requirement that all elections shall be free and equal.⁵ But in Minnesota such acts are declared unconstitutional. A submission of the question to the people, it is said, must in that State be to all of those who are legal voters, and to them only; it cannot be submitted to resident tax-payers alone, nor can a resident tax-payer not a qualified voter participate in the voting.⁷

1 *Baltimore etc. R. R. Co. v. County of Jefferson*, 29 Fed. Rep. 305.

2 *Town of Duanesburgh v. Jenkins*, 57 N. Y. 177. *Contra*, *Harrington v. Plainview*, 27 Minn. 224, 233.

3 *Town of Bennington v. Park*, 50 Vt. 178. *Contra*, *Harrington v. Plainview*, 27 Minn. 224, 233.

4 2 Ky. Acts, 1875-76, p. 629.

5 Ky. Const. art. 13, § 1.

6 Ky. Const. art. 13, § 7; *Kentucky Union R'y Co. v. County of Bourbon*, Supreme Court Ky. (1887), *HOLT, J.*, dissenting.

⁷ *Harrington v. Plainview*, 27 Minn. 294. *Cf. Walnut v. Wade*, 103 U. S. 683; *Babcock v. Helena*, 34 Ark. 469.

§ 205. Of petitions to extend municipal aid to railway enterprises.—Propositions to the voters of a county to issue bonds in aid of railway enterprises must designate the donee. A proposition in the alternative, to aid one or another of designated companies, will render the vote ineffectual.¹ When it is provided that a subscription can be made only upon the petition of a certain proportion of the legal voters of the municipality, the petition will be invalid, unless there has been a compliance both with the letter and spirit of the act.² Accordingly, where the enabling act requires a petition of a majority of the taxpayers of the municipality, a finding by the trustees that one-half had signed the petition, is not sufficient to authorize the aid.³ But the majority of signers may be made up by several petitions signed and presented at different times.⁴ The petition should state whether the aid to be extended to a railway is to be by way of subscription to its capital stock or by the purchase of its bonds.⁵ It should set forth also the nature of the work contemplated, the amount of the bonds sought to be voted, the rate of interest, and the date when the principal and interest shall become due.⁶ When, upon the presentation of a petition of a certain number of taxpayers, it is the duty of the county commissioners to order an election to be held to vote upon the question of subscription, they may be compelled to the performance of this duty by writ of *mandamus*.⁷

¹ *State v. Roggen* (1887), 22 Neb. 118.

² *Craig v. Andes*, 93 N. Y. 405; *People v. Smith*, 45 N. Y. 772; *People*

v. Van Valkenburg, 63 Barb. 105; People v. Peck, 63 Barb. 515; People v. Hulbert, 59 Barb. 446; People v. Franklin, 5 Lans. 129; People v. Hugbitt, 5 Lans. 89; People v. Oliver, Thomp. & C. (N. Y.) 570; Chicago & N. W. R. Co. v. Mallory, 101 Ill. 583; Evansville etc. R. R. Co. v. Evansville, 15 Ind. 395.

3 Slack v. Blackburn, 64 Iowa, 373.

4 People v. Hugbitt, 5 Lans. 89.

5 People v. Van Valkenburg, 63 Barb. 105.

6 State v. Babcock (1887), 21 Neb. 187, construing Neb. Comp. Stat., ch. 45, § 14, and holding further that an election called and held without such petition has no validity.

7 State v. County of Reno (1888), 38 Kans. 317.

§ 206. Of notices of elections and the manner of voting.—It is sufficient if the warrant for the town meeting gives notice with reasonable certainty of the question to be voted upon. Thus, one of the purposes of the meeting being stated to be “to see if the town will loan its credit to aid in the construction” of a specified railroad, was thought to be sufficiently explicit.¹ An act requiring that notice of an election in regard to railway aid shall specify the line of railroad to be aided,² is sufficiently complied with by notice giving the location of the line in direction and terminal points.³ A statute requiring the *termini* of the road proposed to be aided to be indicated in the notice of the election,⁴ was considered to have been sufficiently complied with by specifying that the road was to be built from “a point on the levee” between two designated streets “in the city of Davenport, to Amosa in Jones County, Iowa, or to a point nearer, to connect with a railroad not now running to Davenport aforesaid.”⁵ A requirement of an act, that notice of the vote upon the question of railway aid shall state to what point the railroad shall be “fully completed” before the tax can be levied, is fulfilled by a notice specifying the point to which the road

shall be "ironed and cars running thereon."¹ The question has been raised as to whether a statute providing that notice should be "posted by the town clerk or supervisors," required them personally to act in the capacity of bill-posters, or whether the posting might be done "by" them vicariously. It would seem needless to state that the cases decide in favor of the latter alternative.² After notice has been duly given at the prescribed time before the taking of the vote, modification of the terms upon which the subscription is to be made, if it amount to a new proposition, and the question be voted on in that shape, will invalidate the result, on the ground that in that case due notice would not have been given of the election for the determination of the question which was actually submitted.³ If the enabling act does not prescribe the method of calling and conducting the meeting, it must be done in conformity with the legal and customary method of calling and conducting meetings of a similar nature in that municipality.⁴ Where, however, the statute does prescribe the mode of taking the vote, its provisions should be strictly followed, and unless the meeting be conducted in the manner prescribed by the enabling act, mandamus will not lie against the municipal corporation to compel the issue of the bonds.⁵

1 *Belfast etc. R. R. Co. v. Brooks*, 60 Me. 568.

2 *Iowa, Acts of 16th Gen. Assemb. ch. 123, §2.*

3 *Yarish v. Cedar Rapids etc. R'y Co.* (1887) 72 Iowa, 556, following *Burges v. Mabin* (1886), 70 Iowa, 633.

4 *Iowa, Acts of 20th Gen. Assemb. ch. 159, § 3.*

5 *Bartmeyer v. Rohlf*s (1887), 71 Iowa, 582.

6 *Yarish v. Cedar Rapids etc. R'y Co.* (1887), 72 Iowa, 556; distinguishing *Allard v. Gaston* (1886), 70 Iowa, 731.

7 *Lawson v. Milwaukee etc. R. R. Co.* 30 Wis. 597; *Phillips v. Albany*, 28 Wis. 340; *Jones v. Hurlburt* (1887), 13 Neb. 125.

8 Packard v. Jefferson County, 2 Colo. 338.

9 People v. Dutcher, 56 Ill. 144.

10 Chicago etc. R. R. Co. v. Mallory, 101 Ill. 503.

§ 207. Of variance between petition and notice.

A variance between the petition for holding the election and the notice of the election, the former describing the tax proposed to be "upon the assessed value of the property in said city," and the latter, as "upon the assessed value according to the county valuation," has been held immaterial, the tax being leviable by the board of supervisors and the city and township being co-extensive in limits.¹ So it is immaterial that the petition described the direction of the proposed road as "north-westwardly" to a certain point, while the notice of election described it as "westwardly."²

1 Bartemeyer v. Rohlfis (1887), 71 Iowa, 582.

2 Bartemeyer v. Rohlfis (1887), 71 Iowa, 582.

§ 208. What persons entitled to vote for railway aid.—If persons not legally entitled to the franchise vote for the extension of aid to the railway, it will invalidate the election.¹ It becomes important, therefore, to determine what persons are entitled to participate in the election. When the enabling act submits the question to the "qualified voters" of the municipality, there is but little room for dispute as to who are intended. And likewise, a submission to "the inhabitants" or "people" *simpliciter*, is deemed to be to those persons who are qualified to vote at other ordinary elections.² But when the enabling act restricts the franchise to "the taxpayers" of the municipality,

the question at once arises, whether persons not ordinarily entitled to vote under the general laws of the State, non-residents, minors, women, and idiots, are thereby authorized to participate in the special election. The authorities are not uniform upon this point. In Louisiana it is held that where the question is submitted to the "tax-payers," only those tax-payers may vote who are entitled to the franchise under the general election laws of the State.³ In Wisconsin, under a statute providing for the acceptance through a petition of the tax-payers of a municipality of the proposition of a railroad company for a subscription to its stock, the persons resident in the municipality on the day when the petition may first be presented, and whose property was assessed for taxation on the last assessment roll, except idiots, insane persons and minors, are entitled to sign the petition.⁴ In New York it has been held in an early case, that when a majority of tax-payers is required, non-resident tax-payers are to be counted in estimating the number requisite to constitute the majority.⁵ And in that State, if a petition signed by a majority of the "tax-payers" be required, there must be a majority exclusive of those taxed only for dogs and highway tax.⁶

1 *People v. Cline*, 63 Ill. 594.

2 *Walnut v. Wade*, 103 U. S. 683, 693, 694.

3 *McKenzie v. Wooley* (1887), 39 La. An. 944.

4 *State v. Blackstone*, 63 Wis. 362.

5 *People v. Oliver*, 1 Thomp. & C. 570.

6 *Town of Mentz v. Cook* (1886), 108 N. Y. 504; *Wilson v. Canadon*, 15 Hun, 218; *Angel v. Hume*, 17 Hun, 374.

§ 209. The same subject continued—Partners, trustees and agents as "tax-payers."—Joint ten-

ants, partners, and persons holding property in common, are each entitled to vote and to be counted separately.¹ It is not requisite that the signers of a petition should be the beneficial owners of the property upon which they pay taxes;² but a mere agent is not entitled to be a petitioner.³ The last assessment roll made before the election is to be used in determining what persons are the tax-payers of the municipality;⁴ but an assessment roll made before the assessors have taken the oath of office cannot be used in determining the vote on the question of subscription.⁵

1 *People v. Franklin*, 5 Lans. (N. Y.) 129; *People v. Huggbitt*, 5 Lans. (N. Y.) 89.

2 *People v. Hulbert*, 59 Barb. 446.

3 *People v. Smith*, 45 N. Y. 772. *Cf. People v. Peck*, 62 Barb. 545.

4 *People v. Hulbert*, 59 Barb. 446.

5 *People v. Suffern*, 68 N. Y. 321.

§ 210. **Whether a voter may withdraw his consent.**—A tax-payer who has given his consent to a subscription to a railway may by a writing duly signed and executed revoke his consent at any time before action has been taken thereupon;¹ although there can be no revocation after steps have been taken towards making the subscription and issuing the bonds.² If there be not a majority exclusive of those who have revoked their consent, there is no legal authority for the subscription nor the issue of bonds in payment thereof, and bonds so issued may be canceled in any action brought for that purpose. Where a county judge, upon a petition of a majority of the tax-payers of a town, granted an order for the issue of bonds, appointing commissioners to execute the order, and subsequently re-

fused to allow certain of the petitioners to cancel their signatures, by which the number of signers would have been reduced to less than a majority; and pending an appeal in *certiorari* proceedings, to which the commissioners had not been made parties, they proceeded to issue the bonds, it was held that the action of the judge, in refusing to allow the withdrawal of the signatures, not having been sustained by the court of appeals, did not prevent recovery upon the bonds in an action against the town by a *bona-fide* holder.⁴

1 *Springport v. Teutonia Savings Bank*, 84 N. Y. 403; *People v. Wagner*, 1 Thomp. & C. 221; *People v. Devoe*, 1 Thomp. & C. 142.

2 *First National Bank v. Dorset*, 16 Blatchf. 62; *People v. Hatch*, 1 Thomp. & C. 113; *Noble v. Vincennes*, 42 Ind. 125.

3 *Springport v. Teutonia Savings Bank*, 84 N. Y. 403. As to the right of a voter or the signer of a petition to revoke his consent, see, further, *Monadnock R. R. Co. v. Peterboro*, 45 N. H. 281; *Hannibal v. Fountleroy*, 105 U. S. 408.

4 *Orleans v. Platt*, 99 U. S. 676. As to constructive notice from *lis pendens*, see *Warren County v. Marcy*, 96 U. S. 96.

§ 211. What constitutes "a majority."—Provisions in statutes authorizing municipal subscriptions upon the assent of a majority or of a certain proportion of the legal voters of a place, are usually construed to refer to such proportion of the voters as actually exercise the franchise on that occasion, and not to require a majority of the total number of qualified voters in the municipality; those failing to vote against the subscription being presumed to approve of it.¹ In North Carolina, however, a statute submitting the question of railway aid to a majority of the qualified voters, is construed to require a majority of all the registered qualified voters in the municipality, and not merely a majority of the votes actually cast.² And in Illinois a statute

requiring a majority of the qualified voters, "taking as a standard the number of votes thrown at the last general election previous to the vote had upon the question of subscription under this act, for county officers, is held to require a majority equal to a majority of the total number of votes at the previous election referred to." ³

1 *Mobile Savings Bank v. Oktibbeha County*, 22 Fed. Rep. 580, upon the authority of *Carroll County v. Smith*, 11 U. S. 556, overruling *Hawkins v. Carroll County*, 50 Miss. 735; *County of Cass v. Johnson*, 95 U. S. 360; *County of Cass v. Jordan*, 95 U. S. 373; *St. Joseph Township v. Rogers*, 16 Wall. 644; *Milner v. Pensacola*, 2 Woods, 632; *Springport v. Teutonia Savings Bank*, 84 N. Y. 403; *Cagwin v. Hancock*, 84 N. Y. 532; *Webb v. La Fayette County*, 67 Mo. 353; *Woodson v. Brassfield*, 67 Mo. 331; *Reiger v. Beaufort*, 70 N. C. 319; *Louisville etc. R. R. Co. v. Tennessee*, 8 Heisk. 663; *Hawkins v. Carroll County*, 50 Miss. 735; *People v. Hoop*, 67 Ill. 63; *People v. Chapman*, 66 Ill. 137; *Harrington v. Plainfield*, 37 Minn. 224. *Contra, Harshman v. Bates County*, 92 U. S. 596, overruled by *County of Cass v. Johnson*, 95 U. S. 360, 370; *Miller and Bradley J. J.*, however, dissenting, *q. v.*

2 *McDowell v. Rutherford R'y Construction Co.* (1887) 96 N. C. 514.

3 *Onstott v. People* (1883), 123 Ill. 489, construing Ill. Pub. Laws, 1849-51, p. 28.

§ 212. Of bribery and fraudulent misrepresentations to influence the election.—Where the question of extending municipal aid to a railway is submitted to the popular vote, the result of the election may be vitiated by the introduction of evidence showing that illegal means have been employed to influence the voters in the exercise of their discretion. Thus where it appeared that a member of a town committee had been employed by the railway seeking the aid of the municipality, to procure votes in its favor, and that he had done so by offering to buy the tax certificates to be issued when the aid-tax should have been paid, it was held to render the election null.¹ But false representations to voters, inducing them to vote to extend municipal aid to a railway, does not render the election illegal.²

1 Chicago etc. R'y Co. v. Shea, 67 Iowa, 728.

2 State v. Lake City, 25 Minn, 404; Plattville v. Galena etc. R. R. Co. 43 Wis. 493; Cedar Rapids etc. R. R. Co. v. Boone County, 34 Iowa, 45.

(C). *Change in Status of Municipality or Railway.*

§ 213. **Division of municipality—Repeal and grant of new charter.**—When there has been a division of the municipality after a subscription has been made and one of the divisions chartered as new incorporated, or annexed to another already existing, each division remains liable for its proportion of the subscription;¹ according to the valuation of the property of the undivided municipality at the time the vote to subscribe was taken.² It has been held in Minnesota that where a new municipality has been erected by the legislature out of the territory of a town, without making any provision for the payment of its proportional part of the existing liabilities, the original town remains liable for the whole indebtedness, provided its ability to pay, although largely diminished, is not thereby destroyed.³ But it is submitted to the learned reader that this decision is of doubtful authority. Where a portion of one municipality has been cut off and consolidated with another, the original municipality may proceed by *mandamus* against the clerk of the new consolidated municipality to compel him to set apart from the taxes raised from the property of the detached territory the amount necessary to pay its share of the indebtedness.⁴ A change in the charter of a municipal corporation by amendment, or the substitution of a new charter repealing the old and creating a new corporation under a new name, with different

powers and different officers to administer its affairs, will not defeat the rights of creditors, in the absence of express legislative declaration to that effect, provided the substantial identity of the corporation has not been destroyed;⁵ but if a substantially different corporation be created by the repeal and substitution of charters, the new municipality will not be liable for the bonds of the old, except so far as it has succeeded to the property of its predecessor, unless, of course, the legislature makes express provision for the payment thereof by the new corporation, as a consideration for the grant of the new charter and the change of name.⁶ After a subscription has been duly made, a repeal of the municipal charter does not deprive it of the power to issue the bonds.⁷

1 *Marion County v. Harvey County*, 26 Kan. 181; *Hurt v. Hamilton*, 25 Kan. 76; *Sedgwick County v. Bailey*, 11 Kan. 631; *Eagle v. Beard*, 33 Ark. 497; *McBride v. Hardin County*, 56 Iowa, 219.

2 *Hurt v. Hamilton*, 25 Kan. 76.

3 *State v. Lake City*, 25 Minn. 504.

4 *Sedgwick County v. Bailey*, 11 Kan. 631.

5 *Wood's Railway Law*, § 132; *Broughton v. Pensacola*, 93 U. S. 206; *Milner v. Pensacola*, 2 Woods, 632.

6 *Mt. Pleasant v. Beckwith*, 100 U. S. 514; *Wood's Railway Law*, § 132.

7 *Babcock v. Helena*, 34 Ark. 499.

§ 214. Division of the railway—Consolidation
Change of name.—Where a railway is divided and each part erected into a new company, it has been held that a subscription to the stock of the original corporation and an issue of bonds authorized by a popular vote of a county, could not be legally made to one of the new companies.¹ But a consolidation of a company with another after a municipal subscription has been made, will not operate to annul

the contract when it does not work such a change in the purpose and object of the original corporation as would release other subscribers;² where, however, such a change is wrought by the consolidation, the municipality likewise will be released.³ A town will be estopped to deny as against a *bona-fide* holder, the validity of bonds voted to one company, but issued to an amalgamated company, of which the former had become a part, the records showing that they were directed to be issued and delivered to the latter.⁴ But where it appeared upon the face of the bonds themselves that the enabling act and the popular vote had authorized a subscription to one railway, and the bonds were issued to another, it constituted notice to all of their invalidity.⁵ A mere change in the name, however, of the company to which bonds are issued, does not invalidate the bonds.

1 *Marsh v. Fulton County*, 10 Wall. 676.

2 *Bates County v. Winters*, 112 U. S. 325; *Chicago etc. R. R. Co. v. Putnam* (1867), 36 Kan. 12; *Chickaming v. Carpenter*, 106 U. S. 682; *New Buffalo v. Iron*, 105 U. S. 73; *County of Tipton v. Brown Locomotive Works*, 131 U. S. 523; *Harter v. Kinnochan*, 131 U. S. 542; *Menasha v. Hazard*, 101 U. S. 8; *Emure v. Darlington*, 101 U. S. 67; *Wagon v. Salamanca*, 99 U. S. 486; *County of Schuyler v. Thomas*, 93 U. S. 166; *County of Henry v. N. Co.*, 95 U. S. 519; *Town of East Lincoln v. Davenport*, 94 U. S. 40; *County of Scotland v. Thomas*, 94 U. S. 682; *Lewis v. Carbondon*, 110 U. S. 407; *County of Sup. v. Lewis*, 19 Wall. 361; *State v. Green County*, 51 Mo. 40; *Society for Savings v. New London*, 8 Conn. 174; *Commonwealth v. Pittsburgh*, 41 Pa. St. 278; *Illinois etc. R. R. Co. v. Barnett*, 85 Ill. 311; *Atlantic etc. R. R. Co. v. Phillips County*, 39 Kan. 261; *Vernon v. Hovey*, 5, Ind. 503. Cf. *Harshman v. Bates County*, 83 U. S. 669.

3 *Lynch v. Eastern etc. R. R. Co.* 87 Wis. 430; *Rochester etc. R. R. Co. v. Cuyler*, 7 Lana. 431, where the consolidated company had a different name, directors, route and terms from the original company to which the subscription was made.

4 *Hunter v. Kinnochan*, 103 U. S. 542.

5 *County of Bates v. Winters*, 77 U. S. 83. Cf. *Chicot County v. Lewis*, 163 U. S. 161; *Schaeffer v. Bonham*, 95 Ill. 266; *Bates County v. Winters*, 112 U. S. 325.

6 *Town of Reading v. Wedder*, 66 Ill. 80. Cf. *Town of Franklin v. Lloyd*, 97 Ill. 178.

§ 215. Transfer of railway property and franchises.—The fact that after the making of a municipal subscription, but before the issue of the bonds in payment thereof, the company transferred its franchises to another company, does not affect the validity of the bonds subsequently issued.¹ And in an action to enforce the payment of the proceeds of a tax voted, levied and collected for the purpose of aiding a railway company, the municipality can not set up by way of defense that the company had transferred its property and franchises before the taxes became due.² But where a railway company alienated its road before completion, a tax which had been voted in its aid, but not collected, was held to be forfeited, on the ground that the sale of the road deprived the tax-payer of the interest which the statute contemplated that he should hold.³ In another case municipal aid was proffered a railway company upon the completion of a certain length of road, in return for which each taxpayer was to receive shares of stock. Before the completion of the required number of miles, the company in effect conveyed all its property to a connecting line; and it was held that as this was done before the municipal aid was earned, the tax could not be enforced; nor were the tax-payers bound to accept the stock of the connecting company in *lieu* of the stock of the first.⁴

1 *Henry v. Nicolay*, 95 U. S. 619; *Chicago etc. R'y Co. v. Shea*, 67 Iowa, 723.

2 *Merrill v. Marshall County* (1888), 74 Iowa, 24.

3 *Manning v. Mathews*, 66 Iowa, 675.

4 *Cantillon v. Dubuque & N. W. R. Co.* (1888).

§ 216. Liability of transferee of property of a railway recipient of municipal aid.—As a gen-

eral rule the purchaser or lessee of railway property and franchises must assume the obligations which his vendor or lessor has undertaken in consideration of the extension of municipal aid.¹ Thus a railway company, purchasing at a foreclosure sale a line of road, a part of which was built by municipal aid, thereby assumes the obligations of the company originally aided, and cannot lease the line to another company upon such terms as to deprive the municipality of the benefits expected to be derived by the operation of the road when the aid was voted to the original company.² So where a railroad company that had executed a trust deed upon certain property to secure the performance of conditions upon which a municipal subscription and issue of bonds had been made, subsequently conveyed the property to another company under a decree of court which recognized the lien as a valid and subsisting one, and as following the property into the hands of the judgment creditor, the latter cannot contest the validity of the bonds held by a *bona-fide* purchaser, thus to relieve the property from the lien of the trust deed, the bonds being upon their face negotiable.³ But an act imposing a tax upon railroads equal to the amount of interest upon State bonds issued in their aid, and, in case of failure to pay the tax, sequestrating the income of the companies until the default be fully satisfied, is held not to create a charge upon the roads which all persons dealing with them shall take notice of, and that accordingly neither the State nor its bondholders are entitled to a sequestration of the income of the roads in the hands of purchasers at foreclosure sale.⁴ In Illinois, it has even

been held that the lessees of the purchasers of a railroad at a foreclosure sale are not bound by the stipulations in a contract between a county and the company binding it to stop all trains at the depot at the county seat, although the consideration for the contract was the gift of large sums of money by the county to the company, and the vote of the people authorizing the gift was upon condition that such accommodation would be afforded.⁵

1 *State v. Central Iowa R'y Co.* (1887), 71 Iowa, 410; *Washington etc. R. R. Co. v. Casanova* (1887), 83 Va. 744. But see *People v. Louisville etc. R. R. Co.* Ill. 1887; *Tompkins v. Little Rock etc. R'y Co.* 125 U. S. 109.

2 *State v. Central Iowa R'y Co.* (1887), 71 Iowa, 410.

3 *Washington etc. R. R. Co. v. Casanova* (1887), 83 Va. 744.

4 *Tompkins v. Little Rock etc. R'y Co.* 125 U. S. 109.

5 *People v. Louisville etc. R. R. Co.* (Ill. 1887) 10 N. E. Rep. 887; holding further that the fact that the companies were authorized by their charters to receive such aid and to make such contracts, does not add to the liability of the lessees.

§ 217. *Of assignment of interest in tax—Of forfeiture of charter of railway.*—A railway company may assign a tax voted in its aid.¹ Indeed, at the suit of a judgment creditor, a court of equity may compel the railway to assign its rights against a county that has subscribed to its stock.² The court cannot, however, in the same action compel the county to issue its subscription bonds to the complainant, although the railway company had contracted to turn over the bonds to him. His proper remedy is by *mandamus* against the county officers. For the obligation to issue the bonds, being, it is said, merely statutory, cannot be pleaded as a pure money indebtedness.³ Under a statute providing for forfeiture of charter of a railway for failure to expend a certain proportion of its capital in construction within a certain time, the failure to make

such expenditure within the allotted time avoids municipal bonds issued in its aid, and held either by itself or its agents.⁴

1 *Merrill v. Welsher*, 50 Iowa, 61.

2 *Smith v. Bourbon County*, 127 U. S. 125.

3 *Smith v. Bourbon County*, 127 U. S. 125.

4 *Farnham v. Benedict* (1887), 107 N. Y. 159; holding further that an officer of the railway company who thereafter negotiates any of the bonds becomes personally liable to the municipal corporation, and is not released by accounting to his company for the proceeds.

CHAPTER X.

MUNICIPAL SUBSCRIPTIONS AND MUNICIPAL BONDS.

(A). The Contract of Subscription.

- § 218. The form of the contract of subscription—Whether the popular vote constitutes a subscription: Acceptance by the railway.
- § 219. Municipal subscriptions may be conditional—Injunction to restrain breach of conditions.
- § 220. Of performance and waiver of conditions.
- § 221. Effect of non-performance of conditions upon the validity of bonds.
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(D). Rights and Remedies Herein.

- § 240. Rights and remedies of railway.

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- § 247. Remedies of tax-payers.
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(E). *Construction.*

- § 249. Rule of construction in federal courts—When the decisions of State courts will be followed.

(A). *The Contract of Subscription.*

§ 218. **The form of the contract of subscription—Whether the popular vote constitutes a subscription—Acceptance by the railway.**—A municipal subscription to the stock of a railway need not be in writing; a resolution by the proper board of officers or agents declaring the subscription to be made, acceptance on the part of the railway and notice thereof to the municipality, being sufficient; and the contract so made is binding upon both parties, although there has been no exchange of the bonds of one for the stock of the other.¹ But where bonds in payment of a legal appropriation in aid of a railway are defectively issued, and judicially declared void, neither the written record of the vote nor the issue of the void bonds constitute a contract in writing with the railway which will take the case out of the statutory limitation of five years upon parol agreements.² While no formal acceptance of the subscription is necessary, yet until there has been either an express or implied acceptance there is no contract.³ The vote of the

people, however, in favor of the subscription, does not amount to a contract of subscription, nor vest in the railway a right to enforce specific performance, where the enabling act confers any discretion in relation to the matter, upon the officers of the municipality.⁴ For example, a provision of a statute that a county "shall have power *by resolution* to cause to be issued bonds not exceeding" a certain amount, if a majority of the ballots cast should be in favor of aiding a railway, was held to vest a discretion in the municipal authorities which rendered the vote inoperative until the passage of the resolution by them.⁵ Nor does an order of court declaring that a certain sum "be and is hereby subscribed," amount to a subscription where the subscription is conditional.⁶ So long as any condition remains unsettled, or any discretionary act is to be performed, neither the vote nor the order becomes operative; but when the officers are merely to perform a simple ministerial or clerical duty, the vote or order is in itself the subscription, and *mandamus* lies to compel the performance of the ministerial duties requisite to the formal execution of the contract.⁷

1 *Bates County v. Winters*, 112 U. S. 325; *Cass County v. Gillett*, 100 U. S. 585; *Nugent v. The Supervisors*, 19 Wall. 241; *State v. Jennings*, 4 Wis. 549.

2 *Ætna Life Insurance Co. v. Town of Middleport*, 31 Fed. Rep. 874; *Ætna Life Insurance Co. v. Town of Milford*, 31 Fed. Rep. 879.

3 *Bates County v. Winters*, 112 U. S. 325; *State v. Garoutte*, 67 Mo. 445. *Cf. Pittsburg etc. R. R. Co. v. Allegheny County*, 79 Pa. St. 210.

4 *Bates County v. Winters*, 97 U. S. 83; *Wadsworth v. St. Croix County*, 4 Fed. Rep. 370; *Syracuse Savings Bank v. Town of Seneca Falls*, 86 N. Y. 317; *Cumberland etc. R. R. Co. v. Barren County*, 10 Bush. 604; *Winter v. City Council of Montgomery*, 65 Ala. 403; *People v. Jackson County*, 92 Ill. 441; *People v. Pueblo County*, 2 Colo. 360. *Cf. Bank of Statesville v. Town of Statesville*, 84 N. C. 169.

5 *Wadsworth v. St. Croix County*, 4 Fed. Rep. 370, 378.

⁶ *Mass County v. Winters*, 21 A. 22; *People v. Jackson County*, 52 Ill. 441.

⁷ *Wood's Railway Law*, § 117, citing *People v. Pueblo County*, 3 Colo. 390; *Cumberland etc. R. R. Co. v. Barren County*, 10 Bush, 694. See also cases cited *supra*.

§ 219. **Municipal subscriptions may be conditional—Injunction to restrain breach of conditions.**—A municipality may make the payment of its subscription expressly conditional in the same manner as individual subscribers;¹ unless the enabling act, either expressly or by implication, deprives it of the right to impose conditions.² Authority granted the municipal corporation to impose certain conditions does not by exclusion prevent the imposition of other conditions, unless from the general tenor of the enabling act it is evident that such inhibition was intended.³ A municipal subscriber is entitled, under like circumstances, to the benefit of the same implied conditions as any other subscriber would be.⁴ Thus, if a railway, in submitting to a town a proposition for aid, states therein that it has surveyed and located the line through certain sections of the town to a designated point, and solicits aid to build the road "on the route indicated," it will raise an implied condition that the road shall be constructed as indicated.⁵ But a mere survey does not necessarily constitute a representation as to the location of the road, nor raise an implied condition that it shall be built upon the route surveyed.⁶ When a subscription has been made upon a condition that the railway be constructed along a specified route, the municipality may restrain a diversion from that route.⁷ And a feeble company of doubtful ability to construct any road between the terminal points of its charter, may be

restrained at the suit of a municipality which has subscribed for stock and issued bonds in aid of its proposed main line, from so wasting its means in constructing branch roads as to disable it from building its main line.⁶

1 *Foots v. Mt. Pleasant*, 1 *McCrary*, 101, *People v. Hutton*, 18 *Hun*, 230; *Missouri Pacific Ry Co. v. Tygard*, 84 *Mo.* 263; 51 *Am. Rep.* 97; *Jacks v. Helena*, 41 *Ark.* 213; *Portland etc. R. R. Co. v. Inhabitants of Hartford*, 50 *Me.* 23; *Atchison etc. R. R. Co. v. Phillips County*, 25 *Kan.* 261; *Brokaw v. Gibson*, 73 *Ind.* 543; *Chicago etc. R. R. Co. v. Aurora*, 99 *Ill.* 245; *Town of Platteville v. Galena etc. R. R. Co.* 43 *Wis.* 493; *Noesen v. Port Washington*, 37 *Wis.* 168; *Perkins v. Port Washington*, 37 *Wis.* 177; *C/ Bell Rock v. Henry*, 106 *U. S.* 576; *Shurtliff v. Waukesha*, 74 *Mo.* 130; *State v. Dallas County*, 72 *Mo.* 322; *Chouteau v. Allin*, 70 *Mo.* 290; *Atchison etc. R. R. Co. v. Phillips County*, 25 *Kan.* 261, *Memphis etc. R. R. Co. v. Thompson*, 24 *Kan.* 170.

2 *Wood's Railway Law*, § 112, citing *Brokaw v. Gibson County*, 73 *Ind.* 543.

3 *Wood's Railway Law*, § 122, citing *Vicksburgh v. Onchita*, 11 *La. An.* 649.

4 *Lamb v. Anderson*, 54 *Iowa*, 100. See further, as to implied conditions, §§ 95, 105, 106, 109, 112, *supra*.

5 *Platteville v. Galena etc. R. R. Co.* 43 *Wis.* 493.

6 *Merrill v. Welsher*, 50 *Iowa*, 61.

7 *Platteville v. Galena etc. R. R. Co.* 43 *Wis.* 493.

8 *Wood's Railway Law*, § 119, citing *Platteville v. Galena etc. R. R. Co.* 43 *Wis.* 493.

§ 220. Of performance and waiver of conditions.—*Mandamus* will not lie to compel a city to issue bonds in payment of a conditional subscription until the condition has been performed.¹ A special tax to pay a municipal donation cannot be enjoined upon the ground that the conditions upon which it was voted have not been fulfilled, unless the municipal authorities have declared a forfeiture.² Whether or no the conditions have been performed is to be determined by the municipal authorities themselves; they cannot delegate that duty to others.³ A substantial performance of conditions is sufficient.⁴ Thus, where a prescribed

expenditure of money upon construction within the limits of the municipality has been made, the mere fact that the road was not completed within the time named, does not effect a forfeiture of the donation.⁵ Authority to subscribe to a railroad which has been "surveyed," requires only that there should have been a substantial location designating the *termini* and general route of the road and estimating the cost of construction, not that there should have been a detailed survey of every part of the line.⁶ Where the total amount which a municipality might vote to railway aid was subscribed conditionally to one company, and afterwards a conditional subscription was made to another company, the former is entitled to the bonds upon performance of the conditions, although the latter performed its conditions first.⁷ Authority to require security of the railway that the proceeds of the bonds shall be expended upon the construction of the road, is a privilege which the municipal corporation may waive without impairing the validity of the bonds.⁸

1 State v. Minneapolis, 32 Minn. 501.

2 Nixon v. Campbell, 106 Ind. 47.

3 Jackson County v. Brush, 77 Ill. 59.

4 *Vide supra*, §§ 100, 111, 113.

5 Nixon v. Campbell, 106 Ind. 47. As to fulfillment of conditions with respect to time of completion, see *People v. Holden*, 82 Ill. 93; *Chicago etc. R. R. Co. v. Marseilles*, 84 Ill. 145; *Chicago etc. R. R. Co. v. Schewe*, 45 Iowa, 79, and cases cited *supra*, §§ 112, 113. As to conditions with respect to location and construction, see *Bucksport etc. R. R. Co. v. Brewer*, 67 Me. 295; *Hodgman v. St. Paul etc. R'y Co.* 23 Minn. 153; *State v. Town of Clark*, 23 Minn. 422; *State v. Lime*, 23 Minn. 521, and cases cited *supra*, §§ 110, 111.

6 *County of Wilson v. National Bank*, 103 U. S. 770.

7 *Chicago etc. R'y Co. v. Freeman* (1888), 38 Kan. 597.

8 *Sinking Fund Commissioners v. Northern Bank*, 1 Met. (Ky.) 174.

§ 221. **Effect of non-performance of conditions upon the validity of bonds.**—Although non-performance of a condition will render the bonds invalid as between the municipality and the railway, it will not debar a *bona-fide* purchaser from enforcing payment of bonds in all respects regular upon their face, even though there has been fraud as between the railway and the municipal commissioners.¹ If bonds themselves contain no recital showing the subscription to the railway in payment of which they were issued to have been conditional, and no conditions were prescribed by the enabling act, a *bona-fide* holder is not to be affected with knowledge of conditions of which he had no actual notice.² A plea by a defendant municipality, averring that at the time the bonds were received by the plaintiff the railway company did not intend to extend its line beyond a certain point, but not stating that at the time the plaintiff received them he knew that they were issued upon condition of such an extension, nor that he knew of the intention of the railway not to perform the condition, is defective and constitutes no valid defense.³ While an unfulfilled condition subsequent does not invalidate the bonds issued in payment of the subscription,⁴ the failure of the railway to comply with a condition precedent will render them invalid even in the hands of a *bona-fide* holder.⁵ For example, where the enabling act authorized the issue of bonds, the proceeds of which were to be expended within the limits of the county in which the city was located, and the city delivered them to the railway upon its guaranty that they should be so used, and the company failed to expend them within the county, it

was held that a *bona-fide* holder who purchased the bonds at a foreclosure sale of the property of the railway, could not enforce their payment by the city.⁶ In such a case the purchaser's remedy is against the railway.⁷ If, however, a condition precedent be ambiguously expressed, and the bonds have been issued, a purchaser is warranted in presuming that the condition has been performed to the satisfaction of the municipality.⁸ The *bona-fide* holder need not set forth in his pleadings the facts showing a performance of the condition.⁹

1 *State v. Hancock County*, 12 Ohio St. 536; S. C. 11 Ohio St. 183.

2 *Brooklyn v. Aetna Life Insurance Co.* 99 U. S. 362. *Acc. Mobile Savings Bank v. Oktibbeha County*, 22 Fed. Rep. 580.

3 *Mobile Savings Bank v. Oktibbeha County*, 22 Fed. Rep. 580, 581.

4 *Belfast etc. R. R. Co. v. Brooks*, 60 Me. 568; *People v. Eolden*, 82 Ill. 93. *Cf. Chicago etc. R. R. Co. v. Schewe*, 45 Iowa, 79; *Hodgman v. St. Paul etc. R. R. Co.* 23 Minn. 153; *State v. Lime*, 23 Minn. 521; *State v. Town of Clark*, 23 Minn. 422.

5 *Mellin v. Town of Lansing*, 19 Blatchf. 512; *Bucksport etc. R. R. Co. v. Brewer*, 67 Me. 295; *Chicago etc. R. R. Co. v. Marseilles*, 84 Ill. 145.

6 *Foote v. Mt. Pleasant*, 1 McCrary, 101.

7 *Infra*, § 242.

8 *Clapp v. Cedar County*, 5 Iowa, 15; 68 Am. Dec. 678.

9 *Railroad Co. v. Otoe County*, 1 Dill. 338.

§ 222. **What officers may make the contract of subscription and issue the bonds.**—When the enabling act does not prescribe by whom the contract of subscription is to be executed on behalf of the municipality, the proper persons are those officers whose duty it is to execute other ordinary contracts.¹ Likewise in regard to the issue of the bonds, in the absence of a statutory designation of officers for that purpose, the duty devolves upon the regular municipal authorities. And it is immaterial to a *bona-fide* holder of bonds so issued,

whether they be signed by officers *de jure* or *de facto*.³ But when the statute designates the officers who shall execute the contract, and the manner in which it shall be done, its provisions must be strictly followed.³ Thus, when the question as to whether a subscription shall be made, and the amount thereof, if made, is left to the decision of certain officers or boards, they must themselves determine every point submitted to them, having no authority to delegate to others the discretion conferred upon them.⁴ Accordingly, where a board endowed with such powers recommended a subscription "not exceeding" a specified amount, it was insufficient to justify a subscription, because they thereby undertook to delegate their powers to others.⁵ According to an elementary principle of the law of agency, a municipality cannot be held bound to a subscription executed in its behalf when the railway company is affected with knowledge that the contract was not signed by the proper municipal officers or agents; that is to say, a principal cannot be bound by the acts of an unauthorized agent.⁶ Where the date of bonds, duly delivered to a railway company by the proper officer, appeared to show that they were signed by the municipal authorities whilst in office, the town cannot impeach their validity by showing that one of the officers affixed his signature after a tender and acceptance of his resignation.⁷ Although the bonds issued to pay the subscription be signed by the proper officer, yet if it be done on the Sabbath they will be invalid.⁸

1 *Walnut v. Wade*, 103 U. S. 683; *People v. Smith*, 45 N. Y. 772; *Town of Douglas v. Atlantic Savings Bank*, 97 Ill. 228.

2 *Ralls County v. Douglass*, 105 U. S. 723; *Sauerhering v. Iron Ridge etc.* R. R. Co. 25 Wis. 447. *Cf. Middleton v. Mullica*, 112 U. S. 325.

3 Cases cited *supra*, n. 1; *Danville v. Montpelier etc. R. R. Co.* 43 Vt. 144.

4 *Wood's Railway Law*, § 110, citing *Mercer County v. Pittsburgh etc. R. R. Co.* 27 Pa. St. 389.

5 *Wood's Railway Law*, § 122; *Mercer County v. Pittsburg etc. R. R. Co.* 27 Pa. St. 389; *Wautumika v. Winter*, 23 Ala. 651.

6 *Holbrook v. Farquier etc. Co.* 3 Cranch, 425; *Barnes v. Ontario Bank*, 19 N. Y. 152; *Cook on Stock & Stockh.* § 96, and cases there cited.

7 *Weyauwega v. Ayling*, 99 U. S. 112.

8 *De Forth v. Wisconsin etc. R. R. Co.* 52 Wis. 320; 38 Am. Rep. 737.

§ 223. **Scope of authority of commissioners and municipal officers.**—Commissioners appointed to execute the contract of subscription, act as agents for the municipality, and in that capacity have authority to stipulate the terms or conditions upon which the subscription will be made, which, unless repudiated by the municipality, will be binding upon both parties; and their acts when once fully performed cannot be revoked.¹ But commissioners appointed under the statute being special agents, have no authority to bind the municipality by any act not done in strict compliance with the authority conferred by the popular vote.² Thus, where the town has imposed a condition as to location and construction, the commissioners have no authority to accept any agreement from the company or any substitution for full compliance therewith.³ The municipal officers cannot vary the terms of the subscription as voted upon by the people, nor by a second election change the terms of the original contract.⁴ So, where authority had been conferred to issue bonds upon certain conditions, but the subscription was made absolute in form, the town is not estopped thereby from pleading the breach of conditions.⁵ When the commissioners or the offi-

cers of the municipality are invested with a discretion to make or not to make the subscription, as may seem to them most expedient, their decision is final.⁵ Commissioners, appointed by a county judge to issue town bonds in aid of a railway, may proceed to issue them notwithstanding the pendency of proceedings to review the judge's decision—provided there be no injunction restraining them.⁷ If the statute does not fix the denomination of the bonds, it may be determined by the officers charged with their issue.⁸

1 *Danville v. Montpelier etc. R. R. Co.* 43 Vt. 141. *Cf. Bissell v. Township of Spring Valley*, 110 U. S. 161; *Walnut v. Wado*, 133 U. S. 683; *Kaylake v. Aetna Life Insurance Co.* 106 U. S. 663; *In re Bradner*, 87 N. Y. 171; *People v. New York etc. R. R. Co.* 81 N. Y. 5-5; *Jackson County v. Brush*, 77 Ill. 59; *State v. Hancock County*, 12 Ohio St. 593; *S. C.* 11 Ohio St. 183.

2 *Horton v. Thompson*, 71 N. Y. 513.

3 *Falconer v. Buffalo etc. R. R. Co.* 69 N. Y. 49.

4 *Madison County Court v. Richmond etc. R. R. Co.* 80 Ky. 16. *Acc. Carroll County v. Smith* 111 U. S. 536.

5 *People v. Hitchcock*, 2 N. Y. Sup. Ct. 131.

6 *Mercer County v. Pittsburgh etc. R. R. Co.* 27 Pa. St. 323. *Cf. Falconer v. Buffalo etc. R. R. Co.* 69 N. Y. 491.

7 *Mitchell v. Strough*, 35 Hun. 83.

8 *County of Green v. Daniel*, 103 U. S. 187; *Wood's Railway Law*, § 111.

(B.) *The Payment of the Subscription.*

§ 224 Of payment of the subscription—**Whether in bonds or in money.**—A subscription by a municipal corporation to the capital stock of a railway company may generally be paid either in bonds of the municipality or in money.¹ The municipal corporation instead of negotiating its bonds itself may exchange them with the railway company for the stock of the latter.² In New York, however, it has been held that the municipality should not issue its bonds directly to the railway,

but should negotiate them itself and pay the proceeds thereof to the railway in exchange for its stock, upon the ground that this method is more advantageous to the municipality.³ When the enabling act has simply granted authority to a municipality to aid a railway enterprise, without specifying whether it shall be by the issue of bonds or the payment of money, it is not with the railway company to elect to take bonds and to bring proceedings to compel their issue. Its only claim is for money, and it has no option as to how it shall be paid.⁴

1 *Town of Montclair v. Ramsdell*, 107 U. S. 147; *Town of Concord v. Portsmouth Savings Bank*, 92 U. S. 625; *Meyer v. City of Muscatine*, 1 Wall. 334, 392; *Curtis v. County of Butler*, 24 How. 435; *Evansville, etc. R. R. Co. v. City of Evansville*, 15 Ind. 335; *Commonwealth v. Pittsburgh*, 41 Pa. St. 270.

2 *Curtis County v. Butler*, 24 How. 435; *Myer v. City of Muscatine*, 1 Wall. 884; *Evansville, etc. R. R. Co. v. City of Evansville*, 15 Ind. 35; *Commonwealth v. Pittsburgh*, 41 Pa. St. 278. *Contra*, *Starin v. Town of Genoa*, 23 N. Y. 430.

3 *Starin v. Genoa*, 23 N. Y. 439.

4 *Chicago, etc. R. R. Co. v. St. Anne*, 101 Ill. 151; *Wood's Railway Law*, § 123.

§ 225. **Of the time and place of payment.**—The bonds cannot be issued payable at the expiration of a longer period than that prescribed by the enabling act.¹ Where a general act authorized municipal corporations to issue railroad-aid bonds running six years, and a special act authorized the issue by a town of such bonds running four years, the two are not to be construed together to authorize the town to make its bonds payable in ten years.² An indorsement upon bonds to the effect that they should become due and payable upon default in payment of interest, is effectual to render the whole principal due upon the failure of the municipality

to pay the interest coupons at maturity.³ An act providing that taxes voted and collected in aid of railways should be forfeited if allowed to remain in the municipal treasury more than two years; does not work a forfeiture where there is a continuous demand by the parties entitled to the money, and no consent that any part thereof should remain in the treasury.⁴ In the absence of express authority to make municipal bonds payable elsewhere, they are to be made payable at the municipal treasury. If, however, without authority they name another place of payment, the bonds remain valid and only the illegal provision is void.⁵ When the bonds themselves name the place of payment, neither the municipality nor the legislature can make any change therein;⁶ for “a note or bond payable at a specified place is essentially different from one which is payable generally,”⁷ and the place of payment being a part of the contract, a law which changes the terms of the contract in this respect impairs the obligation and is unconstitutional.⁸

1 *Cairo etc. R. R. Co. v. Sparta*, 17 Ill. 106; *People v. Harp*, 67 Ill. 62. Cf. *Wheatland v. Taylor*, 29 Hun, 70.

2 *Norton v. Town of Dyersburg*, 8 Sup. Ct. Rep. 1111.

3 *Griffin v. City Bank*, 58 Ga. 584.

4 *Merrill v. Marshall County* (1888), 74 Iowa, 24.

5 *Shelock v. Winetka*, 68 Ill. 530. But in *Calhoun County v. Galbraith*, 99 U. S. 214, it was held that the act being silent as to place of payment, the county might designate the place.

6 *Dillingham v. Hook*, 32 Kan. 185.

7 *Lawe v. Bliss*, 24 Ill. 168; 76 Am. Dec. 742; *Childs v. Laffin*, 55 Ill. 159; *Chitty on Bills*, 566.

8 *Dillingham v. Hook*, 32 Kan. 185; *Wood's Railway Law*, § 103, note.

§ 226. Of taxation for payment of municipal donations or subscriptions.—A railway is entitled to the whole of the proceeds of a tax levied in its

aid. The county treasurer cannot deduct therefrom his commission for the collection of the tax, the statute under which it was voted making no provision for such a deduction, and the general law of the State directing that his commission shall be paid "out of the county treasury."¹ In Kentucky an act directed the general council of the city of Louisville to levy an annual tax to pay the principal and interest of railway-aid bonds, and provided that in case the tax should not be legally levied in any year the rate of taxation to meet this bonded indebtedness should be a certain percentage of the taxable property, "as long as these taxes should be needed." The council failed to levy the tax for 1887, and suit was brought by a taxpayer to enjoin the assessor from collecting the tax for the bonds and interest, on the ground that it was not needed for the current year. But it was decided that a tax imposed as long as needed to pay a particular debt, means an imposition of the tax until the debt is satisfied; and the injunction was refused.² Where a two-thirds vote is necessary to appropriate money to aid in the construction of a railroad, a two-thirds vote is also necessary to raise it.³

1 *Merrill v. Marshall County* (1887), 74 Iowa, 24, construing Iowa Code, § 3793, subd. 2, and Iowa Acts of 16th Gen. Assemb. ch. 123, § 4.

2 *City of Louisville v. Murphy* (1887), 86 Ky. 53, construing Ky. Act of May 12, 1884.

3 *Monadnock R. R. Co. v. Peterboro*, 49 N. H. 281.

§ 227. **Of the taxation of railway property in aid of railways.**—The property of a railway company is subject to a tax levied in aid of railway enterprises, whether the proceeds thereof are to be appropriated to other companies,¹ or to the com-

pany paying the tax.² It is sometimes provided by the statute authorizing the tax, that such part thereof as shall be collected from the railway in whose aid it was imposed, shall be set apart to meet the obligations of the municipality incurred in its behalf. An act providing that the proceeds of the county taxes upon a railway, in aid of the construction of which a township had issued bonds, shall be devoted to payment of interest on the bonds, is not unconstitutional as an interference with the levy of taxes, being merely a direction as to the application of county revenue.³ In New York there is a statute providing that all taxes, except for schools and roads, assessed upon any railroad in a town which has issued bonds in aid thereof, shall be held as a sinking fund for the redemption of the municipal bonds.⁴ And it is the duty of the county treasurer under this act to set aside and invest all such taxes paid him by the railways, although by doing so he will not have money enough to pay the obligations of the county to the State and to the county officials and other county creditors.⁵ The constitutionality of this statute also has been attacked upon several grounds, but upon each of them sustained.⁶ Where a town has collected from a railroad company money to pay the interest on bonds issued in its aid, and it appears that the bonds were void, the railroad will be entitled to recover the money, and no limitation will bar it of that right.⁷

1 Baltimore etc. R. R. Co. v. County of Jefferson, 29 Fed. Rep. 305.

2 Cases cited *infra*.

3 Brown v. Hertford County (1888), 100 N. C. 92, construing N. C. Laws (1887), ch. 365, § 31.

4 N. Y. Laws of 1869, ch. 907, § 4; as amended by N. Y. Laws of 1871,

ch. 283. And this statute is held to apply not only to railways constructed under the act of 1867, but to all towns bonded in aid of railroads constructed in or through them: *Clark v. Sheldon* (1887), 106 N. Y. 104.

5 *Clark v. Sheldon* (1887), 106 N. Y. 104.

6 *Clark v. Sheldon* (1887), 106 N. Y. 104.

7 *Aurora v. Chicago etc. R. R. Co.* 19 Ill. App. 360.

(C). *Municipal Bonds.*

§ 228. **Municipal bonds not to be issued below par.**—A municipal corporation may not lawfully negotiate its bonds for less than their face value;¹ if it has done so, however, the bonds are not thereby invalidated; but a court of equity will enjoin the holder from enforcing payment of more than the amount paid by the original purchaser, together with legal interest thereon.² But an innocent *transferee* may recover the full face value of the bond although he purchased it for less.³ Mr. Justice Field, delivering the opinion of the court in the case last cited, while recognizing that there are “numerous decisions in conflict with this view,” declared the rule stated to be the sounder doctrine. “All sales of such securities,” said the court, “are made with reference to prices current in the market, and not with reference to their par value. It would introduce, therefore, inconceivable confusion if *bona-fide* purchasers in the market were restricted in their claims upon such securities to the sums they had paid for them.

1 *Neuse River Navigation Co. v. Commissioners*, 7 Jones (N. C.) 375; *Daniel on Negotiable Instruments*, 3d ed. § 1533.

2 *County of Armstrong v. Brinton*, 47 Pa. St. 367: “Let them be enforced,” said the court, pp. 373, 374, “to the extent of the money they brought, and the popular mind will at once recognize the reason and justice of such a decree. *And nobody will be hurt.*”

3 *Cromwell v. County of Sacramento*, 96 U. S. 51, 59, 60.

4 *Cromwell v. County of Sacramento*, 96 U. S. 51, 60, citing *Stoddard v. Imball*, 6 Cush. 463; *Allaire v. Hartshorn*, 1 Zab. 665; *Williams v. Smith*,

2 Hill, 301; *Chicopee Bank v. Chapin*, 8 Met. (Mass.) 40; 47 Am. Dec. 175; *Lay v. Wissman*, 36 Iowa, 305.

§ 229. **Of the negotiability of municipal bonds and their coupons.**—Municipal bonds issued payable to order or to bearer are regarded, whether under seal or no, as negotiable instruments.¹ But bonds made payable upon conditions are not negotiable.² It is not essential to their negotiable quality that the bonds contain the words “value received negotiable and payable without defalcation,” notwithstanding a statute requiring these words in ordinary “bonds, bills and notes.” As a general rule, a *bona-fide* holder of municipal bonds payable to bearer, may recover on them, although they had been stolen, and the true owner had advertised for them;⁴ but in Alabama the legal title to municipal bonds payable to bearer passes only by indorsement.⁵ Interest coupons of municipal bonds are likewise generally considered negotiable, although not made payable to any particular person,⁶ the *bona-fide* purchaser not being subject to the equities subsisting between the original parties,⁷ nor is he affected by want of title in the vendor.⁸ It has been said, however, that the coupons are not negotiable unless containing negotiable words.⁹

1 *Mercer County v. Hackett*, 1 Wall. 83; *Knox County v. Aspinwall*, 21 How. 539; *Clapp v. Cedar County*, 5 Iowa, 15; 68 Am. Dec. 678; *State v. Union Township*, 8 Ohio St. 394; *State v. Van Horne*, 7 Ohio St. 327.

2 *Blackman v. Lehman*, 63 Ala. 547; 35 Am. Rep. 57.

3 *Barrett v. Schuyler County*, 44 Mo. 197.

4 *Consolidated Association etc. v. Anegro*, 28 La. An. 552; *Elizabeth v. Force*, 29 N. J. Eq. 587.

5 Ala. Code, § 2098; *Blackman v. Lehman*, 63 Ala. 547; 35 Am. Rep. 57.

6 *Smith v. Clark County*, 54 Mo. 58.

7 *Cromwell v. Sacramento Co.* 94 U. S. 351; *Knox County v. Aspinwall*, 21 How. 539; *Kenosha v. Lamson*, 9 Wall. 477; *Aurora v. West*, 7 Wall. 82; *Thompson v. Lee County*, 3 Wall. 327; *Arents v. Commonwealth*, 18 Gratt. 750.

8 *Murray v. Lardner*, 2 Wall. 110.

9 *Augusta Bank v. Augusta*, 49 Me. 507. *Cf. Ketcham v. Duncan*, 96 U. S. 659.

§ 230. Of bona-fide purchasers of municipal bonds.—A *bona-fide* holder need not show that he himself was a purchaser for value where he derives its title through a previous holder who has given a valuable consideration.¹ The owner of bonds is none the less a *bona-fide* purchaser on account of his having taken them in payment of a debt previously owing him.² A purchaser who accepted the bonds, knowing that the conditions of the subscription had not been complied with, cannot set himself up as a *bona-fide* holder.³ Where bonds are fraudulently issued the burden of proof is upon the holder to show that he purchased in good faith.⁴ "Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transaction, will not defeat his title; that result can be produced only by bad faith on his part."⁵ To show that the purchaser of fraudulently issued bonds had knowledge of the fraud, direct, positive evidence is not requisite; it may be established by reasonable inference from other facts.⁶ The rule as to constructive notice from *lis pendens* does not apply to negotiable securities purchased prior to maturity. And it is immaterial whether the securities were created while the suit was pending or before, or whether the controversy relates to their origin or their transfer.⁷

1 *Montclair v. Ramsdell*, 107 U. S. 147; *Whiting v. Potter*, 18 Blatchf. 165; *Irwin v. Ontario*, 18 Blatchf. 259. *Acc. Foote v. Hancock*, 16 Blatchf. 424; *Phelps v. Yates*, 16 Blatchf. 192; *Phelps v. Lewiston*, 15 Blatchf. 131.

- 2 *Mobile Savings Bank v. Ottobbeha County*, 24 Fed. Rep. 110.
- 3 *Mobile Savings Bank v. Ottobbeha County*, 24 Fed. Rep. 110.
- 4 *Cass County v. Green*, 66 Mo. 498; *Tracey v. Phelps*, 22 Fed. Rep. 634.
- 5 *Wood's Railway Law*, § 104, citing *Murray v. Lardner*, 2 Wall. 110. Cf. *Smith v. Sacramento County*, 11 Wall. 150.
- 6 *Cass County v. Green*, 66 Mo. 498.
- 7 *Warren County v. Marcy*, 97 U. S. 96; *Thompson v. Perrin*, 103 U. S. 896; *County of Cass v. Gillett*, 100 U. S. 585; *Orleans v. Platt*, 99 U. S. 676; *County of Warren v. Marcy*, 97 U. S. 96; *Bound v. Texas etc. R. R. Co.* 48 Tex. 316; *Wood's Railway Law*, § 102. Cf. *Macon County v. Shores*, 97 U. S. 272; *Mitchell v. Strough*, 35 Hun, 83.

§ 231. **Estoppel of municipality to deny legality of bonds.**—Although non-compliance with the provisions of the act authorizing the subscription, may be, if seasonably taken advantage of, used as a means to prevent the making of the subscription and the issue of the bonds, yet after the contract has been concluded, and the bonds once issued and accepted in good faith, the municipality will be estopped to deny their validity, on account of any mere formal defect.¹ Thus, municipal bonds after having been issued, are not to be invalidated by a mere informality in calling the meeting at which the subscription was authorized;² nor by the fact that the vote at the meeting was taken by division of the house or *viva voce*, when the statute provided that it should be by ballot;³ nor by the fact that the meeting was called by the supervisors when it should have been called by the county court (their validity having been recognized by funding the old bonds for new);⁴ nor can the municipality set up the fact that the voters at the election were not duly sworn (the ordinance authorizing the subscription and issue reciting that authority had been given by an election held for the purpose);⁵ and after the railway has been built, the collection of a tax voted in its favor will not be

enjoined merely because the certificate made by the clerk to the county auditor did not show all the conditions of the vote except by reference to a copy of the notice of election attached thereto.¹ So, also, with respect to the performance of conditions: the issue of bonds by the proper authorities and exchanging them for the stock of the railway estops the municipal corporation from denying that the condition was performed to its satisfaction.² Informalities which might have invalidated bonds issued in payment of the subscription may be cured by lapse of time, the municipality being barred by *laches* from pleading in defense its own failure to comply with the statute.³ But the doctrine of estoppel does not apply where the vote was procured by fraud.⁴

1 *Kerr v. Corry*, 105 Pa. 51, 302; *Clarke v. Hancock County*, 27 Ill. 292; *Johnson v. Stark*, 24 Ill. 75; *First National Bank v. Walcott*, 19 Blatchf. 370; *Munson v. Lyons*, 12 Blatchf. 539; *Amey v. Allegheny*, 24 How. 364; *Whiting v. Potter*, 2 Fed. Rep. 517; *Elmendorf v. New York*, 35 Wend. 693; *Elmendorf v. Ewen*, 2 Leg. Obs. (N. Y.) 85; *Striker v. Kelly*, 7 Hill, 9; *Lamb v. B. C. R. etc. R. R. Co.* 39 Iowa, 333; *B. C. R. etc. R. R. Co. v. Stewart*, 39 Iowa, 267.

2 *Bauerhering v. Iron Ridge etc. R. R. Co.* 25 Wis. 447.

3 *New Haven etc. R. R. Co. v. Chatham*, 42 Conn. 465.

4 *Jasper County v. Ballou*, 103 U. S. 745.

5 *Gause v. Clarksville*, 1 McCrary, 72.

6 *Chicago etc. R'y Co. v. Shea*, 67 Iowa, 722.

7 *County of Randolph v. Post*, 25 U. S. 502; *Leavenworth etc. R. R. Co. v. Douglas County*, 18 Kan. 167, 169, 186.

8 *Tipton County v. Rogers Locomotive Works*, 103 U. S. 533; *Harter v. Kerr*, 103 U. S. 502; *Menasha v. Hazard*, 102 U. S. 81; *Block v. Commonwealth*, 118 U. S. 5; *Lyons v. Munson*, 93 U. S. 684; *Pendleton County v. Amy*, 11 Wall. 297; *Amey v. Allegheny*, 24 How. 364; *First National Bank v. Walcott*, 19 Blatchf. 370; *Munson v. Lyons*, 12 Blatchf. 539; *Whiting v. Potter*, 2 Fed. Rep. 517; *Striker v. Kelly*, 7 Hill, 9; *Lamb v. Burlington etc. R. R. Co.* 39 Iowa, 333; *Leavenworth etc. R. R. Co. v. Douglas County*, 18 Kan. 167; *Clarksburg v. Platt*, 99 U. S. 676; *Hackett v. Ottawa*, 118 U. S. 100; *Chicago v. Hancock*, 84 N. Y. 532, reversing *B. C. R. R. Co. v. Stewart*, 39 Iowa, 267; *W. Maupke Wharf Co.* 63 Ala. 611.

9 *Stout v. Miles*, 38 Iowa, 35. Cf. *People v. Santa Anna*, 67 Ill. 27. But see *Woods Railway Law*, § 102, citing *Macon County v. Shores*, 27 U. S. 282.

§ 232. Sundry acts constituting an estoppel. The city or county may be estopped from pleading that a subscription was not duly made, by levying a tax to pay the interest or a part of the bonds issued in payment thereof;¹ by voting as a stockholder at corporate meetings,² and by continued recognition of the validity of the bonds.³ But there is a case in Mississippi holding that in an action against the railway company to restrain its disposing of bonds invalid for non-compliance with the statute, the city will not be estopped by the fact that it has assumed control over the railway stock which it received in exchange for the bonds, nor by the fact that it has levied taxes and paid the interest on its bonds.⁴ Funding the old bonds for new will operate to estop a county from setting up the fact that the meeting at which the original issue was authorized was called by its board of supervisors when it should have been called by the county court.⁵ Where the validity of certain bonds issued by the defendant county had been recognized in a previous action without objection by the county, and the decree recognizing their validity had been twice affirmed in the supreme court, the county is estopped to deny the validity of the bonds in subsequent actions.⁶

1 *Eminence v. Grasser*, 81 Ky. 52; *County of Cass v. Gillett*, 100 U. S. 585; *County of Moultrie v. Rockingham etc. Bank*, 92 U. S. 631.

2 *County of Cass v. Gillett*, 100 U. S. 585; *County of Moultrie v. Rockingham etc. Bank*, 92 U. S. 631.

3 *State v. Anderson County*, 8 Baxt. 247.

4 *Madison County v. Paxton*, 57 Miss. 701.

5 *Jasper County v. Ballou*, 103 U. S. 745.

6 *Washington etc. R. R. Co. v. Casenove* (1887), 83 Va. 744.

§ 233. Recitals in bonds—Operation of, to estop municipality.—Recitals in bonds that all the

statutory requirements with respect to their issue have been complied with are conclusive as to those facts between the municipality and a *bona-fide* holder, the former being estopped to deny the truth in its recitals;¹ even though the statute allowed the subscription to be made upon conditions, and declared that until they were fulfilled the bonds should not be binding.² Thus, where bonds contained a recital that they should be valid only if it should be duly certified upon them that the conditions upon which they were authorized to be issued had been performed, and such a certificate thereon had been made and signed by the chairman of the town supervisors, the town was estopped as against a *bona-fide* purchaser before maturity, to deny their validity.³ Accordingly, when the bonds contain a proper recital of the performance of the condition required for their lawful issue, and a suit is brought upon them by a *bona-fide* holder, a plea which simply tenders an issue as to the actual performance of the condition is demurrable.⁴ A county cannot plead by way of defense in an action by a *bona-fide* holder that bonds containing a recital that they were issued in conformity to the provisions of the statute were not issued until after its authority to issue them had expired.⁵ A recital that bonds were issued in accordance with certain city ordinances, cited by their titles only, estops the city as against an innocent holder from showing that the ordinances in fact authorized the issue for other purposes;⁶ even a misstatement in the bonds of the statute by which they were authorized does not necessarily affect their validity.⁷ But when the holder has actual knowledge of the facts rendering the is-

sue invalid, and when the recitals of the bond itself betray the defect, the municipality is not estopped from pleading non-compliance with the formalities prescribed by the enabling act.⁶ It is not essential to the validity of municipal bonds duly issued and authorized that they should contain a recital of the particular purpose for which they were issued.⁷

1 *New Providence v. Halsey*, 117 U. S. 336; *Sherman County v. Hanson*, 109 U. S. 73; *Ottawa v. Portsmouth Bank*, 101 U. S. 31; *City of Albany v. Society for Savings*, 111 U. S. 57; *Wadsworth v. Wadsworth*, 3 U. S. 670; *Manascha v. Hazard*, 102 U. S. 61; *Hackett v. Ottawa*, 99 U. S. 81; *Galbreath v. Galbreath*, 9 U. S. 21; *Wilson v. Salami*, 19 U. S. 10; *County of Warren v. Marcy*, 27 U. S. 5; *San Antonio v. Murphy*, 8 U. S. 1; *County of Henry v. Nixday*, 51 U. S. 6; *Johnson County v. Johnson*, 41 U. S. 202; *Douglas County v. Hollis*, 11 U. S. 184; *Layman v. County of Barnes*, 94 U. S. 71; *Venice v. Minkick*, 93 U. S. 4; *County of Lewis v. Lewis*, 93 U. S. 484; *Marcy v. Hawkey*, 1 U. S. 107; *Marshall v. County of Perry*, 2 U. S. 1; *Lewis v. Sherman County*, 1 Mcrary 37; *Hickman v. City of Pleasant*, 5 Ill. 112; *Pollard v. City of Pleasant*, 11 U. S. 1; *Per v. Harbort*, 11 U. S. 175; *Johnson v. County of 2 U. S. 175*; *Milner v. Park*, 1 U. S. 108; *32 Doug. v. 12 U. S. 1*; *H. v. 285*; *Jefferson County v. Lewis*, 20 Fla. 480; *Clark v. 1 Miss. 200*; *Lane v. Edwards*, 2 Mo. 374; *Williams v. Lewis*, 31 Ark. 41; *Clark v. Jacksonville*, 1 W. 100; *Marquette Bank v. Bergen County*, 115 U. S. 384. *Contra, Cagney v. Hancock*, 64 N. Y. 55.

2 *American Insurance Co. v. Bruce*, 105 U. S. 732. *See Lewis v. Harbort County*, 105 U. S. 739, where the bonds were deposited in escrow with the State treasurer until performance of the conditions, but were put in circulation by fraud. *Wood's Railway Law*, § 102.

3 *Manascha v. Hazard*, 102 U. S. 61.

4 *Hauvo v. Ritter*, 97 U. S. 380; *Wood's Railway Law*, § 102.

5 *County of Moultrie v. Rockingham etc. Bank*, 92 U. S. 621.

6 *Hackett v. Ottawa*, 99 U. S. 81.

7 *Gould v. Sterling*, 23 N. Y. 450.

8 *Anthony v. Jasper County*, 101 U. S. 603; *Bates County v. Winters*, 67 U. S. 83; *McClure v. Oxford*, 94 U. S. 429; *Marshman v. Bates County*, 89 U. S. 869; *Craig v. Andes*, 93 N. Y. 403; *Dodge v. Platte County*, 23 N. Y. 318; *Horton v. Thompson*, 71 N. Y. 513; *Angel v. Hume*, 17 Hun. 374; *Woodruff v. Ockalona*, 57 Miss. 806; *Johnson v. Butler*, 31 La. An. 770; *Lippincott v. Pava*, 83 Ill. 24; *Barnes v. Lecon*, 84 Ill. 461.

9 *Carpenter v. Buena Vista County*, 5 Ill. 506.

§ 234. **Estoppel by certificate of municipal authorities.**—When it has been provided by the enabling act that certain officers of the municipality shall determine whether or no the requisite steps

nave been taken to authorize the issue of the bonds, their certificate to the effect that all the prerequisites have been complied with, is conclusive in an action upon the bonds, excluding all inquiry into the actual facts of the case;¹ and it is immaterial whether such prerequisites be contained in the enabling act or in the State constitution.² For example, on an issue upon the question whether or no a majority of taxpayers had voted in favor of a subscription in payment of which the bonds held by the plaintiff were issued, he is not obliged to show that every vote was cast by a person legally entitled to the franchise; it is enough for him to introduce in evidence the poll-books of the election and the certificate of returns to the municipal authorities.³ The municipality is estopped equally, whether such certificate be spread upon the municipal records,⁴ or appears merely as a recital in the bonds themselves, the recital itself being a decision of the fact by the appointed officials.⁵ If the enabling act makes the assessor's certificate that the requisite consents of tax-payers have been obtained evidence upon which the railroad commissioners may issue the bonds, the commissioners, when they have acted in good faith, will be protected by the certificate, although the requisite consents had not been obtained.⁶

1 *Black v. Commissioners*, 99 U. S. 686; *Macon County v. Shores*, 97 U. S. 272; *Rock Creek v. Strong*, 93 U. S. 271; *Ballou v. Jasper County*, 3 Fed. Rep. 620; *Knox County v. Aspinwall*, 21 How. 539; *Lynde v. Winnebago County*, 16 Wall. 6; *Grand Chute v. Winegar*, 15 Wall. 355; *Kenicott v. Supervisors*, 16 Wall. 252; *Munson v. Lyons*, 12 Blatchf. 539; *People v. Mitchell*, 35 N. Y. 551; *Bank of Rome v. Village of Rome*, 19 N. Y. 20; 75 Am. Dec. 272; *Evansville etc. R. R. Co. v. Evansville*, 15 Ind. 395; *State v. Hancock County*, 12 Ohio St. 596.

2 *Westerman v. Cape Girardeau County*, 5 Dill. 112.

3 *Hannibal v. Fauntleroy*, 105 U. S. 408. *Acc. Evansville etc. R. R. Co. v. Evansville*, 15 Ind. 395.

4 The purchaser is not bound to look behind the municipal records: *Gelpeck v. Dubuque*, 1 Wall. 175; *Bank of Rome v. Rome*, 19 N. Y. 20; 75 Am. Dec. 272; *San Antonio v. Lane*, 32 Texas, 405; *Hannibal etc. R. R. Co. v. Marion County*, 33 Mo. 234; *Society for Savings v. New London*, 29 Conn. 174; *Aurora v. West*, 22 Ind. 88; *Clapp v. Cedar County*, 5 Iowa, 15; 68 Iowa, 678; 68 Am. Dec. 678.

5 *Coloma v. Eaves*, 92 U. S. 484; *Town of Venice v. Murdock*, 92 U. S. 494; *Converse v. City of Ft. Scott*, 92 U. S. 503; *Marcy v. Oswego*, 92 U. S. 637; *Humboldt v. Long*, 92 U. S. 642; *Wilson v. Salamanca*, 92 U. S. 439. *Acc. Sherman County v. Simons*, 109 U. S. 735; *Humboldt Township v. Long*, 92 U. S. 642; *Davis v. Kendallville*, 5 Biss. 280; *Nicolay v. St. Clair County*, 3 Dill. 133; *Huidekoper v. Buchanan County*, 3 Dill. 175; *Pollard v. City of Pleasant Hill*, 3 Dill. 195.

6 *Ontario v. Hill*, 99 N. Y. 324.

§ 235. The same subject continued—Records may be attacked by direct proceedings only.—But a purchaser will not be protected because of having relied upon recitals, or a certificate of officers not in duty bound to know whether the statutory requirements had been complied with.¹ The bonds to be regular upon their face must have been issued by the proper municipal authorities acting legally and under authority of law.² Accordingly, when bonds are issued by a county court in excess of the legal limit, a mere certificate of the person holding the office of judge of that court, not as a recital in the bond, does not estop the county, neither statute, vote nor order authorizing such certificate.³ While the entry and order of the municipal authorities as to the result of the election cannot be collaterally attacked, it may be contested in proceedings brought directly for that purpose;⁴ nor does the fact that the subscription has been made, and that the railway has made contracts based upon the subscription, prevent a contest of the election in direct proceedings.⁵

1 *Davless County v. Dickinson*, 117 U. S. 657; *Jefferson County v. Lewis*, 20 Fla. 980.

2 *State v. Hancock County*, 11 Ohio St. 183; S. C. 12 Ohio St. 596.

3 *Davless County v. Dickinson*, 117 U. S. 657.

4 *McDowell v. Rutherford R'y Construction Co.* (1887), 96 N. C. 514;
Goforth v. Rutherford R'y Construction Co. (1887), 96 N. C. 535.

5 *Goforth v. Rutherford R'y Construction Co.* (1887), 96 N. C. 535.
As to the manner of contesting an election in Indiana, see *Goddard v. Stockman*, 74 Ind. 400.

§ 236. **Holders of municipal bonds affected with knowledge of the law.**—The holders of municipal aid bonds are affected with knowledge of the law under which they are issued.¹ For example, in a case in which a condition was recited in a bond that it was to be paid out of money raised by a special tax upon the property of a certain section of a city, it was held that although the city had a right to impose the condition, yet as the State constitution prohibited the levy of such a tax, payment of the bonds could not be enforced.² But while the holder of municipal bonds is affected with knowledge of the law authorizing their issue, he is not affected with knowledge of the fact as to whether or no the law has been complied with, where the bonds on their face are regular.³ He may as to the fact of compliance with the law rely upon the decision and certificates of the municipal officers who were authorized to decide whether its requirements have been followed.⁴ Thus, under a statute authorizing townships to subscribe to any railway to be built “near” them, a subscription was voted to a railway nine miles distant, and bonds issued reciting the authority of the statute, of the vote of the people, and of the order of the county court; and in an action brought upon unpaid coupons, it was held that the court should not go behind the decision of the popular vote and the local author-

ities to inquire whether the railway was "near" the township, within the meaning of the statute.⁵

1 *Thompson v. Mamakating*, 37 Hun, 400.

2 *Chicago etc. R. R. Co. v. Aurora*, 93 Ill. 205.

3 *Sherman County v. Simons*, 109 U. S. 135; *Meyer v. Muscatine*, 1 Wall. 385; *Flagg v. Palmyra*, 33 Mo. 410; *Society for Savings v. New London*, 29 Conn. 124; *Williams v. Roberts*, 83 Ill. 11; *Quinoy v. Warfield*, 25 Ill. 317; 79 Am. Dec. 330. But see *Vicksburg v. Lombard*, 51 Miss. 111.

4 *Black v. Bourbon County*, 99 U. S. 686.

5 *Van Hostrop v. Madison*, 1 Wall. 291. Acc. *Meyer v. Muscatine*, 1 Wall. 391.

§ 237. **No estoppel as to bonds issued entirely without authority.**—Where there is a total want of legal authority to issue bonds, the municipality will not be estopped by recitals.¹ For example, if the statute require twenty days' notice of the meeting, and only ten were given, the bonds are void, notwithstanding a recital on their face that the law had been complied with in all respects.² And so where the statute required an application for the calling of a meeting to vote on the question of subscription, to be signed by twenty legal voters, bonds issued in pursuance of the vote of a meeting called upon the application of twelve voters only were invalid, although they contained a recital that the law had in all respects been complied with.³ For in such cases there is a total lack of authority, and no more power to issue the bonds exists under a vote so given than did before the meeting was held.⁴ Likewise, when the bonds are absolutely void for want of legal authority to issue them, no subsequent recognition, or act of the municipal officers, can impart validity to them or estop the tax-payers from denying their legality.⁵ The railway will not be heard to plead that it has performed labor and incurred liabilities upon the faith of the supposed

subscription as against the right of the municipality to deny a total want of authority to make the subscription.⁶ And even the completion of the railway will not in such cases operate as an estoppel.⁷ Bonds issued entirely without authority are invalid not only in the hands of the original purchaser but also in the hands of an innocent transferee.⁸ Even a *bona-fide* holder for value cannot recover upon them.⁹ Contrary to the weight of authority is a late case in Alabama, in which railway-aid bonds were held enforceable by *bona-fide* purchasers, although their issue had not been authorized by a majority of the people, and the city council had, in issuing them, acted in disregard of the statute.¹⁰ And in the New York "Supreme Court," it has been said that as against a *bona-fide* purchaser, relying upon the affidavit of the assessor or clerk, required by statute, to the effect that the consent of a majority of the tax-payers had been given, the authority of the commissioners to issue the bonds cannot be impeached by showing that less than a majority had voted in favor of the subscription.¹¹ This decision, however, was reversed in the court of appeals.¹² Bonds so issued are not *prima facie* void, the burden being upon the municipality to prove its want of authority to issue them.¹³

1 Ogden v. Daviess County, 102 U. S. 634; Antony v. Jasper County, 4 Dill. 136; Sherrand v. Lafayette County, 3 Dill. 236; Clay v. Hawkins County, 5 Lea, 137; Webb v. Lafayette County, 67 Mo. 353; Gaddes v. Richland County, 92 Ill. 119; Lippincott v. Pana, 92 Ill. 24; People v. Jackson County, 92 Ill. 441; State v. School District, 10 Neb. 544.

2 Phillips v. Albany, 28 Wis. 340. Cf. Williams v. Roberts, 88 Ill. 11; People v. Oldtown, 88 Ill. 202.

3 Phillips v. Albany, 28 Wis. 340. Cf. Williams v. Roberts, 88 Ill. 11; People v. Oldtown, 88 Ill. 202.

4 Wells v. Pontiac County, 102 U. S. 625.

5 Ryan v. Lynch, 68 Ill. 160; Treadway v. Schnauber, 1 Dak. 236.

6 People v. Jackson County, 92 Ill. 441.

7 *Town of Plainview v. Winona etc. R. R. Co.* (1887), 36 Minn. 505; *Town of Elgin v. Winona etc. R. R. Co.* (1887), 36 Minn. 517; following *Harrington v. Plainview*, 27 Minn. 224.

8 *Linley v. Rattakin*, 32 Ark. 619; *Hancock v. Chicot County*, 32 Ark. 575. The bonds are held free from all defects of origin except want of power in the maker: *Cromwell v. Sacramento County*, 96 U. S. 51.

9 *Allen v. Louisiana*, 103 U. S. 80; *Lippincott v. Pana*, 92 Ill. 24.

10 *State v. Montgomery*, 74 Ala. 226.

11 *Cagwin v. Hancock*, 22 Hun, 291.

12 *Cagwin v. Hancock*, 84 N. Y. 532. *Acc.* *People v. Barrett*, 18 Hun, 206.

13 *Lincoln v. Cambria Iron Co.* 103 U. S. 412.

§ 238. Of coupons of municipal bonds.—It is not essential in the absence of a statute so requiring, that the coupons should be signed by all the officials who signed the bonds.¹ It is generally conceded that coupons bear the legal rate of interest from date of maturity.² There is a case in Connecticut, however, holding that interest is not recoverable upon them.³ Coupons are transferable by mere delivery.⁴ The fact that as between the railway company and the municipality the bonds themselves are invalid, does not prevent an innocent coupon-holder from recovering; but he must establish his *bona-fide* ownership of the coupons, and a former judgment in his favor upon other coupons detached from the same bonds does not estop the municipality.⁵ To maintain an action upon coupons, demand and protest are not requisite.⁶ The statute of limitations begins to run upon coupons from the date of maturity.⁷

1 *Antony v. Jasper County*, 101 U. S. 693; *Wayauwega v. Ayling*, 99 U. S. 112; *First National Bank v. Concord*, 50 Vt. 257; *Lackawanna Iron Co. v. Letthenulf*, 38 Wis. 152; *Bank v. Statesville*, 7 Am. & Eng. R. R. Cas. 178.

2 *Pana v. Bowler*, 107 U. S. 505; *Walnut v. Wade*, 103 U. S. 683; *Fauntleroy v. Hannibal*, 5 Dill. 219; *Gelpeck v. Dubuque*, 1 Wall. 384; *Aurora v. West*, 7 Wall. 82; *Hollingsworth v. Detroit*, 3 McLean, 472; *San Antonio v. Lane*, 32 Tex. 405; *North Pennsylvania R. R. Co. v. Adams*, 54 Pa. St. 94; 93 Am. Dec. 677; *Beaver County v. Armstrong*, 44 Pa. St. 53; *Welch v. St. Paul etc. R. R. Co.* 25 Minn. 314. *Acc.* *First National Bank v. Bennington*, 16 Blatchf. 53; *People v. Ford County*, 63 Ill. 142; *Beattie v. Andrew County*, 56 Mo. 42.

3 *Rose v. Bridgeport*, 17 Conn. 243.

4 *Ketcham v. Douglass*, 96 U. S. 659.

5 *Stewart v. Lansing*, 104 U. S. 505; *Wood's Railway Law*, 103, where there is found a copious collection of cases upon the negotiable nature of municipal bonds and coupons, *q. v.*

6 *Nashville v. Potomac Insurance Co.* 58 Tenn. 296; *Nashville v. First National Bank*, 57 Tenn. 402.

7 *Clark v. Iowa City*, 20 Wall. 583.

§ 239. Of the substitution and re-issue of bonds.—New legal bonds substituted for bonds illogally issued may be enforced by the holder.¹ If a renewal bond for any reason be void, the old bond, although surrendered for cancellation, is not extinguished.² One bond issued for the whole amount of a municipal subscription may be taken up, and new bonds of a smaller denomination issued in its stead.³ Where bonds issued to pay a subscription to a railway had not been called for, and by order of the county court had been destroyed, it was held that the court might, at the request of the company, re-issue them.⁴

1 *Merchants' Bank v. Little Rock*, 5 Dill. 265.

2 *Gause v. Clarksville*, 1 McCrary, 78.

3 *Commonwealth v. Allegheny County*, 37 Pa. St. 237. As to the substitution of new engraved bonds with lithographed signatures for those originally issued, see *McKee v. Vernon County*, 3 Dill. 210.

4 *Matthews v. Blount County*, 3 Lea, 120. As to scaling of bonds, see *Merchants' Bank v. Pulaski County*, 1 McCrary, 316; *Gause v. Clarksville*, 5 Dill. 165.

(D.) Rights and Remedies Herein.

§ 240. Rights and remedies of the railway.—When all the preliminary proceedings requisite to the valid issue of bonds in aid of a railway have been duly and legally taken, and it remains only for the municipal authorities to perform the ministerial duty of making the issue, the railway, or its creditors, may proceed by *mandamus* to compel

them to the performance of their duty.¹ Mere *laches*, in the absence of evidence that the municipal corporation was injured thereby, does not debar the railway from its remedy by *mandamus*.² And where the proceeds of a tax voted in aid of a railway by the townships of a county was placed in the county treasury, and losing its identity was expended in payment of ordinary debts of the county, the county may be held liable for the amount, either by the railway or its assignees.³ But a municipality will not be held to respond to its liability for the subscription to the stock of a railway in an action brought solely to recover upon bonds issued without legislative authority.⁴ If the railway company has not expended upon the construction of its road within the subscribing county enough to entitle it to the whole amount voted in its aid upon condition that it be there expended, it is entitled to reimbursement for the amount actually expended.⁵ A temporary suspension of the work of construction during four years, does not work a forfeiture of a tax voted in aid of a railway; and although during the cessation of work the company had advised that the collection of the tax should be suspended, it is not thereby estopped to insist upon its collection.⁶ Knowledge on the part of the railway company of the want of legal authority for the issue of the bonds, will of course bar its right to enforce their issue.

1 United States v. Clark County, 98 U. S. 211; Cass County v. Johnson, 95 U. S. 340; Amy v. Supervisors, 11 Wall. 176; Mayor v. Lord, 9 Wall. 409; Supervisors v. Durant, 9 Wall. 415; Riggs v. Johnson, 6 Wall. 166; Weber v. Lee County, 6 Wall. 210; United States v. Keokuk, 6 Wall. 511; Supervisors v. United States, 4 Wall. 435; Van Hoeffmann v. Quincy, 4 Wall. 535; Knox County v. Aspinwall, 24 How. 376; United States v. Badger, 6 Biss. 303; Sibley v. Mobile, 3 Woods, 535; Rusch v. Des Moines County, 3 Woods, 313; Muscatine v. Mississippi etc. R. R. Co. 1 Dill. 563;

Lansing v. County Treasurer, 1 Dill. 522; *Welch v. St. Genevieve*, 1 Dill. 130; *People v. Allen*, 56 N. Y. 533; *People v. Batchelor*, 53 N. Y. 123; *Hawland v. Eldridge*, 43 N. Y. 467; *Cumberland etc. R. R. Co. v. Washington County* 13 Bush, 66; *Raleigh etc. R. Co. v. Jenkins*, 68 N. C. 502; *Leaswell et al. R. R. Co. v. Davidson County* 1 Sneed, 537, 9 C. 67 Am. Dec. 424; *Ex parte Nelson et al. R. R. Co.* 45 Ala. 696, 6 Am. Rep. 722; *Brodie v. McCule* 33 Ark. 630 (Chicago etc. R. R. Co. v. St. Anne, 1st Ill. 151; *Illinois et al. R. R. Co. v. Barnett*, 85 Ill. 313, *People v. Cass County*, 77 Ill. 438; *People v. Glenn*, 70 Ill. 232; *People v. Harp*, 67 Ill. 62, *People v. Logan County* 63 Ill. 374, *Houston v. People*, 57 Ill. 398, *Napa Valley R. R. Co. v. Napa Count.* 30 Cal. 430; *California Northern R. R. Co. v. Butte County*, 14 Cal. 641; *Dittinger v. Bell*, 65 Ind. 445, *Jager v. Dougherty*, 61 Ind. 525; *Mt. Vernon v. Hovey*, 52 Ind. 563, *Cincinnati et al. R. R. Co. v. Clinton County*, 1 Ohio St. 77.

2 *State v. Jennings*, 48 Wis. 842.

3 *Merrill v. Marshall County* (1888), 74 Iowa, 24.

4 *Norton v. Town of Dyersburg*, 8 Sup. Ct. Rep. 1111.

5 *Casady v. Lawry*, 49 Iowa, 521. Cf. *Merrill v. Welsher*, 53 Iowa, 61.

6 *Merrill v. Welsher*, 50 Iowa, 61.

7 *People v. Logan County*, 63 Ill. 374.

§ 241. **Rights and remedies of holders of municipal bonds.**—Where power is given to public officers by language permissive in form, it will be construed as peremptory, wherever the public interest or individual rights call for its exercise.¹ Upon maturity of municipal bonds and default of payment, *mandamus* will lie to compel the levy of a tax and payment of the bonds from the funds so raised.² The court cannot, however, itself appoint officers to assess and levy the tax.³ A *mandamus* to "the county court" to levy a tax in payment of a municipal subscription, is not to be defeated by the resignation of the justices of the peace associated with the county judge, and together with him constituting the court when it is engaged in transacting the financial business of the county.⁴ The county judge alone may proceed to make the levy.⁵ When the tax has been levied, but the proceeds thereof retained by the municipal treasurer, *mandamus* will lie to compel him to pay the money over to the

bondholders.⁶ If the fund out of which bonds in aid of a railway are to be paid is to be raised by levying a tax of a certain percentage of the assessed valuation of property of the municipality, and the amount so raised proves insufficient, the bondholders are entitled to be paid the balance due out of the general funds of the county.⁷ In proceedings to compel by *mandamus* the delivery of bonds or the levy of a tax, the plaintiff must show clearly that he is legally entitled to the remedy sought; and the burden of proving that all the steps necessary to the validity of the bonds have been taken by the municipality devolves upon the plaintiff, unless he be a *bona-fide* holder.⁸ A denial of the writ of *mandamus* to compel payment of interest on bonds is held to be conclusive of their invalidity in a subsequent action to enforce payment of the bonds themselves, although the fact that the denial was based upon the ground of their invalidity is inferred from the pleadings and not from the express language of the judgment.⁹ *Mandamus* will not lie where the acts sought to be compelled are unauthorized; such, for example, as the levy of a tax not authorized by law, or the levy of a tax in excess of the amount specified by the enabling act;¹⁰ for "it may be observed that the office of a writ of *mandamus* is not to create duties but to compel the discharge of those already existing."¹¹

1 *Supervisors v. United States*, 18 Wall. 71, and cases there reviewed; *Sibley v. Mobile*, 4 Am. Law T. N. S. 226.

2 *United States v. Jefferson County*, 1 McCrary, 356; *United States v. Lincoln County*, 5 Dill. 184; *Shelby County v. Cumberland etc. R. R. Co.* 8 Bush, 209; *Maddox v. Graham*, 2 Met. (Ky.) 56; *Flagg v. Palmyra*, 33 Mo. 440; *Columbia County v. King*, 13 Fla. 452; *McLennon v. Anson County*, 71 N. C. 38; *Moore v. New Orleans*, 32 La. An. 726; *State v. New Orleans*, 52 La. An. 763; *Brodie v. McCabe*, 53 Ark. 690; *Limestone County v. Rothcs*, 48 Ala. 43; *Commonwealth v. Perkins*, 43 Pa. St. 400; *Commonwealth v. Pittsburg*, 43 Pa. St. 391; *Commonwealth v. Allegheny County*, 32 Pa. St.

218; *Hopple v. Brown*, 13 Ohio St. 311; *State v. Johnson County*, 12 Iowa 327.

3 *Heine v. Levee Commissioners*, 19 Wall. 655; *Rees v. Watertown*, 19 Wall. 107.

4 Ky. Rev. Stat. 328, ch. 27, art. 27, § 2.

5 *Merriweather v. Muhlenburg County Court*, 120 U. S. 354, an able opinion by HARLAN, J.

6 *State v. Craig*, 69 Mo. 565; *State v. McCrilles*, 4 Kan. 250.

7 *United States v. County of Clark*, 96 U. S. 211; *United States v. Knox County*, 2 McCrary, 625.

8 *People v. Morgan County*, 55 N. Y. 587; *People v. Corwin*, 2 Hun, 337; *Humphrey County v. McAldoo*, 7 Heisk. (Tenn.) 585; *Chicago etc. R. R. Co. v. Mallory*, 101 Ill. 583; *People v. Oldtown*, 88 Ill. 202; *Santa Cruz R. R. Co. v. Santa Cruz County*, 62 Cal. 239.

9 *Louis v. Brown Township*, 109 U. S. 166; *Black v. Commissioners*, 90 U. S. 683; *Wood's Railway Law*, § 128. Cf. *Postmaster-General Kendall's Case*, 12 Peters (U. S.) 524.

10 *United States v. Macon County*, 99 U. S. 582; *County of Macon v. Huldekofer*, 99 U. S. 592, note following; *United States v. Clark County*, 91 U. S. 211; *Supervisors v. United States*, 18 Wall. 71, 77, 82, distinguishing *Butz v. City of Muscatine*, 8 Wall. 575.

11 *Supervisors v. United States*, 18 Wall. 71, 77.

§ 242. **Rights and remedies of holders of void municipal bonds.**—If a municipal corporation has issued bonds without legal authority, and has applied the proceeds to legitimate municipal purposes, while the holders cannot recover upon the bonds as such, they may recover for money had and received.¹ And where for other reasons the bonds are invalid, the bondholder may have the same remedy. Thus, in a case in which a city, authorized to borrow money, issued bonds to all appearances valid, but in reality void on account of having been antedated in order to avoid a registration act, and used the proceeds of the bonds for legitimate municipal purposes, *bona-fide* holders were allowed to recover the amount actually paid to the city, together with interest at six per cent.² The holder of void bonds has his remedy also against the railway from whom he purchased. Although the bonds of a State issued in aid of a railway be unconstitutional

and void, yet as against the company which sold them they are good. The railway having put them in circulation as valid bonds is estopped to deny their constitutionality.³ If bonds be void on account of the failure of the conditions upon which they were issued, and the railway has given to the municipality a bond of indemnity to secure the performance of the conditions, the holder of the bonds may be subrogated to the rights of the municipality against the railway.⁴ In a late case in Virginia a county issued and delivered its bonds to a railway company upon conditions for the performance of which the company gave a bond of indemnity. The railway failed to comply with the conditions, and the county refused to pay the interest coupons held by a *bona-fide* purchaser. It was decided that by the bond of indemnity the railway company became the principal debtor and the county the surety, and that the creditor might be substituted to the benefits of the security given by the principal debtor for the indemnity of the surety.⁵

1 *Gause v. Clarksville*, 1 McCrary, 78. *Acc. Dill v. Wareham*, 7 Met. 438.

2 *Wood v. Louisiana*, 5 Dill. 122.

3 *Florida etc. R. R. Co. v. Schutte*, 103 U. S. 118.

4 *Washington etc. R. R. Co. v. Casenove* (1887), 83 Va. 744.

5 *Washington etc. R. R. Co. v. Casenove* (1887), 83 Va. 744.

§ 243. **Rights and remedies of the municipality.**—Any acts on the part of a railway which would release an individual subscriber from his contract will release a municipal subscriber also, and a bill may be filed praying a rescission of the contract of subscription.¹ If the directors of a railway have fraudulently paid contractors too large an amount for the construction of the road, a

municipal subscriber may by bill in equity pray a rescission of the fraudulent contracts.² A municipal subscriber may, in certain cases, be granted an injunction to restrain a railway company from the violation of conditions.³ Where bonds have been issued to a railway without legal authority, and by reason of being negotiated by the company came into the hands of *bona-fide* purchasers who were successful in holding the town liable thereon, the town may maintain its action against the railway for the recovery of the amount of the bonds with interest.⁴

1 Crawford County v. Pittsburgh etc. R. R. Co. 32 Pa. St. 141.

2 People v. Logan County, 63 Ill. 374. But such wrongful acts of the directors cannot be plead by way of defense in an action against a city to enforce its subscription: *Ibid.*

3 *Supra*, § 213.

4 Town of Plainview v. Winona etc. R. R. Co (1887), 36 Minn. 505; Town of Elgin v. Winona etc. R. R. Co. (1887), 36 Minn. 517.

§ 244. Rights and remedies of municipality not superior to other subscribers.—It is clear that the rights and privileges of an ordinary stockholder belong to a municipal corporation when it has subscribed to the stock of a railway company, so far as in their nature they can be exercised or enjoyed; and it is equally clear that the same attendant burdens are likewise assumed.¹ Thus, like other subscribers, it may enforce a delivery of stock, and under the same circumstances which would bar the private subscriber's right, the municipality will be barred.² A municipal subscriber cannot stand on any higher ground than other subscribers with respect to cancellation of the contract, nor be released from the payment of any part of the amount subscribed, except under such circumstances as would

justify a compromise with an ordinary subscriber.³ To effect a valid compromise, there must be a reasonable doubt as to the liability of the municipality.⁴ A municipal subscriber may be released by such a change in the direction of the route of the railway as would release other non-assenting subscribers.⁵

1 *Pittsburg etc. R. R. Co. v. Allegheny County*, 79 Pa. St. 210; *Shipley v. City of Terre Haute*, 74 Ind. 237; *County of Morgan v. Allen*, 103 U. S. 498; *National Bank v. Case*, 99 U. S. 628; *Hatch v. Dana*, 101 U. S. 205; *Murray v. Charleston*, 96 U. S. 432; *Sanger v. Upton*, 91 U. S. 56; *Upton v. Tribilcock*, 91 U. S. 65; *Sawyer v. Hoag*, 17 Wall. 610; *Bank of United States v. Planters' Bank*, 9 Wheat. 904; *Robinson v. Bank*, 18 Ga. 66; *Morgan v. County of Thomas*, 76 Ill. 120; *Gray v. The State*, 72 Ind. 567; *State v. Holladay*, 72 Mo. 499.

2 *Wapello County v. Burlington etc. R. R. Co.* 44 Iowa, 385; *Pittsburgh etc. R. R. Co. v. Allegheny County*, 79 Pa. St. 210. *Cf.* *State v. Garoutte*, 67 Mo. 445.

3 *County of Morgan v. Allen*, 103 U. S. 498; *Sawyer v. Hoag*, 17 Wall. 610; *State v. Holladay*, 72 Mo. 499.

4 A conflict between the State and federal courts as to the validity of bonds, creating a reasonable doubt as to the liability of the municipality, constitutes cause sufficient to justify a compromise: *State v. Holladay*, 72 Mo. 499.

5 *Noesen v. Port Washington*, 37 Wis. 168; *Perkins v. Port Washington*, 37 Wis. 177.

§ 245. The same subject continued—Delivery of stock.—A municipal subscriber may enforce the delivery of the stock of the railway company in the same manner and under the same circumstances as an individual, upon payment of the amount subscribed.¹ But the contract of subscription is entire, and until the full amount is paid, delivery cannot be enforced.² It cannot require a *pro rata* delivery of shares of the railway in exchange for an issue of bonds less in amount than the whole sum subscribed.³ Under an act requiring a railway company to pay the interest upon bonds issued in its aid until the completion of the road within the county, at which time it was to deliver preferred stock to the county to the amount of the bonds, it

was held that the company was not liable for the interest on the bonds after the county became entitled to interest on the preferred stock, although the stock had been received by the county before the completion of the road; and the county will not be heard to plead that the act of its commissioners in receiving the stock before the designated time was *ultra vires*.⁴ A provision in the enabling act that, with the consent of the city, the citizens who actually pay the tax levied in aid of a railway shall receive from the city the stock given it by the railway, does not invalidate the tax, nor relieve the city of its obligation to pay it.⁵

1 Wapello County v. Burlington etc. R. R. Co. 44 Iowa, 585.

2 Wood's Railway Law, § 130.

3 Wapello County v. Burlington etc. R. R. Co. 44 Iowa, 585.

4 County of Lancaster v. Oheraw etc. R. R. Co. (1888), 28 S. C. 134.

5 Talbot v. Dent, 9 Mon. B. 526; Slack v. Maysville etc. R. R. Co. 13 Mon. B. 9.

§ 246. Remedies of the municipality with respect to void bonds.—An action will lie at the suit of a city to correct errors in bonds to make them conform to the vote by which their issue was authorized.¹ If bonds have been issued fraudulently or without legal authority, the city may maintain an action to have them declared void and delivered up for cancellation, provided the bonds or their holders are within the jurisdiction of the court.² Or if the subscription has been judicially declared not binding, the city is entitled to an injunction restraining any person claiming under the plaintiff or the company from asserting his claim against the municipality.³ But a judgment declaring bonds to be void is not binding upon any one

not a party to the action.⁴ And in subsequent actions between the municipality and holders of the bonds who were not parties to the prior proceedings, the latter will not be estopped from raising an issue as to matters adjudicated in the previous action.⁵ Accordingly, all the bondholders should be parties to such proceedings.⁶ But after a decree of court has declared the right of the municipal corporation to issue bonds in aid of a railway, all purchasers are privies to the decree, and may rely upon the estoppels.⁷ The municipality itself may by bill in equity restrain its treasurer from applying funds in his hands to the payment of void bonds.⁸

1 *Essex v. Day*, 52 Conn. 483.

2 *Waverly v. Auditor*, 100 Ill. 344; *Anderson County v. Paola etc. R'y Co.* 20 Kan. 534; *Paola etc. R'y Co. v. Anderson County*, 16 Kan. 302.

3 *Perkins v. Port Washington*, 37 Wis. 177.

4 *Roberts v. Bolles*, 101 U. S. 119; *Empire v. Darlington*, 101 U. S. 87; *Brooklyn v. Insurance Co.* 99 U. S. 362; *Springport v. Teutonia Savings Bank*, 75 N. Y. 397.

5 *Springport v. Teutonia Savings Bank*, 75 N. Y. 397.

6 *Board v. Texas etc. R. R. Co.* 46 Tex. 316; *Leavenworth etc. R. R. Co. v. Douglass County*, 18 Kan. 169.

7 *State v. Chester etc. R. R. Co.* 13 S. C. 290. *Acc. County of Jasper v. Ballou*, 103 N. C. 745.

8 *Missouri River etc. R. R. Co. v. Miami County*, 12 Kan. 230.

§ 247. **Remedies of tax-payers.**—Proceedings to test the validity of an issue of municipal bonds in aid of railways may be by *certiorari*, bill of review, writ of error,¹ or by injunction.² Any tax-payer of a municipality may institute proceedings in equity in his own name, and in behalf of all other tax-payers, for the purpose of enjoining an unauthorized issue of bonds, or to restrain the levy of a tax, and the payment of bonds that have been illegally issued;³ or to restrain the payment of

bonds issued upon conditions not fulfilled.⁴ The bill alleging irregularities in the issue of bonds to a railway company should set forth specifically wherein the irregularities consist, for the purpose of informing the defendants as to what they have to defend or explain.⁵ If the collection of a tax might have been restrained, and the tax-payer has failed to institute proceedings for that purpose, he cannot recover from the treasurer of the municipal corporation the amount of the tax paid by him, after it has been paid to the bondholders or the railroad company.⁶

1 *Anderson County v. Houston etc. R. R. Co.* 52 Tex. 228.

2 *Vide infra*.

3 *Redd v. Henry County*, 31 Gratt. 695; *Winston v. Tennessee etc. R. R. Co.* 1 Baxt. (Tenn.) 60; *New Orleans etc. R. R. Co. v. Dunn*, 51 Ala. 128; *Wright v. Bishop*, 88 Ill. 302; *Campbell v. Paris*, 71 Ill. 611; *Chestnutwood v. Hood*, 68 Ill. 132; *Bittinger v. Bell*, 65 Ind. 445; *Jager v. Dougherty*, 61 Ind. 418; *Delaware County v. McClintock*, 51 Ind. 325; *Nefzger v. Davenport etc. R. R. Co.* 30 Iowa, 642. See, however, *Wilkinson v. Peru*, 61 Ind. 1. The acts of a county court in ascertaining the result of an election on the question of railroad aid are ministerial, and not judicial; and the tax-payers contesting the legality of the election are not confined to remedy by appeal, but may maintain an action to declare the subscription void, and enjoin the collection of the tax: *Kentucky Union Railway Co. v. County of Bourbon*, 85 Ky. 98, construing Kentucky Act of March 10, 1854. Under an act (Missouri Act of March 24, 1853, § 31), by which tax-payers of a county extending aid to a railway became entitled to stock in the company, it was held that they did not acquire a lien upon the property of the railway which would follow it into the hands of a purchaser at a foreclosure sale subject to equitable liens; and that the fact that the money paid by them was turned over to contractors building the road, is immaterial: *Spurlock v. Missouri Pacific R'y Co.* (1887), 90 Mo. 199.

4 *Wagner v. Meety*, 69 Mo. 150.

5 *Matthews v. Blout*, 3 Lea, 120; *Wood's Railway Law*, § 129.

6 *Butler v. Fayette County*, 46 Iowa, 326.

§ 248. **Conflict of remedies—Operation of mandamus upon injunction, and vice versa.**—Where bondholders have obtained judgment in an action at law to enforce the payment of bonds, but before execution thereof an injunction has been granted at the suit of tax-payers to restrain the officers

from executing the judgment, a court of equity will not place the officers "between two fires" by granting a writ of *mandamus* to compel them to proceed;¹ so *mandamus* will not lie at the instance of a railway to compel commissioners of a county to subscribe for its stock, where a perpetual injunction has been previously obtained at the suit of tax-payers to restrain them from making the subscription.² But where *mandamus* has issued prior to the granting of an injunction restraining the officers from proceeding, the latter will interpose no legal obstacle to the former.³ For the order granting the former writ is conclusive as to the rights of the parties.⁴ It would seem, however, that an injunction against the plaintiffs at whose instance a *mandamus* had issued, restraining them from enforcing it against the officer, would operate to relieve the officer from the consequences of disobedience of the latter.⁵

1 *Ex parte Fleming*, 4 Hill, 582.

2 *Ohio etc. R. R. Co. v. Wyandotte County*, 7 Ohio St. 278.

3 *Cumberland etc. R. R. Co. v. The Judge of Washington County Court*, 10 Busb. 564, 568.

4 *Cumberland etc. R. R. Co. v. The Judge of Washington County Court*, 10 Busb. 564, 570.

5 *Cumberland etc. R. R. Co. v. The Judge of Washington County Court*, 10 Busb. 564, 571, 572.

(E). Construction.

§ 249. Rule of construction in federal courts—When the decisions of State courts will be followed.—In construing legislative enactments relating to municipal aid to railways, the federal courts will generally follow the decisions of the court of last resort in which the question arose, except where the decisions of that court are con-

flicting or unsettled, in which case the federal courts will decide according to their own idea of the law which should control,¹ usually following, in case of conflict of decisions, that construction which prevailed at the time the contract was made. Thus it is declared by the federal Supreme Court that the sound and true rule is, that if a contract at the time it was made was valid by the laws of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the State or decisions of its courts altering the construction of the law.² This principle has been illustrated in a recent case in which the decisions of the courts of Illinois had become, after the issue of the bonds, adverse to the doctrine that the legislature may ratify an unauthorized municipal subscription which it might have originally conferred the power to make.³

1 *Town of Enfield v. Jordan*, 119 U. S. 680; *Ohio Life Insurance Co. v. Debolt*, 16 How. 416; S. C. 15 How. 432; *San Antonio v. Mehafty*, 96 U. S. 312.

2 *Ohio Life Insurance Co. v. Debolt*, 15 How. 432; S. C. 16 How. 416; *Taylor v. Ypsilanti*, 105 U. S. 60; *New Buffalo v. Cambria Iron Co.* 105 U. S. 73; *Douglass v. County of Pike*, 99 U. S. 687; *Olcott v. Supervisors*, 16 Wall. 690; *City v. Lamson*, 9 Wall. 485.

3 *Dows v. Town of Elmwood*, 34 Fed. Rep. 114, following *Bolles v. Town of Brimfield*, 120 U. S. 759.

CHAPTER XI.

THE ISSUE OF STOCK,

AND HEREIN OF FICTITIOUS AND OVERISSUED STOCK.

- § 250. Of the issue of stock—The several methods.
- § 251. The issue of stock dividends—When fictitious and fraudulent.
- § 252. Issue of stock for money—Validity of issue at less than par—The American rule.
- § 253. The same subject continued—Exception where the rule would be prejudicial to creditors—Gratuitous issue.
- § 254. The English rule as to issue below par.
- § 255. Issue of stock for check or note.
- § 256. Issue of stock for property or services.
- § 257. Issue of stock for property or services—The English rule as to registration.
- § 258. Distinction between an issue for property or services and a "sale" of stock.
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- § 265. The remedy of dissenting shareholders.
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- § 267. The remedy of corporate creditors—The English rule.
- § 268. The remedies of transferees of fictitiously issued stock.
- § 269. When transferees of fictitiously issued stock are affected with notice.
- § 270. The liability of transferees of fictitiously issued stock.
- § 271. The liability of corporate officers for fictitious issue of stock.
- § 272. Overissued stock.
- § 273. Liability of the corporation for damages for injury caused by over-issue.

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- § 278. The same subject continued—Distinction between an overissue and an irregular increase of stock.
- § 279. The remedy of stockholders and of the corporation with respect to overissued stock.
- § 280. Remedy for holder of overissued stock.
- § 281. The measure of damages.
- § 282. Remedial statutes with respect to overissued stock.

§ 250. Of the issue of stock—The several methods.—There are, according to the leading authority upon this subject,¹ three methods of issuing stock; the first and most usual by means of subscriptions payable in cash and to the full amount of the face value of the shares;² the second by means of a subscription payable by its terms, in labor, property, or both, or by means of a so-called sale of stock for labor, property or both;³ and the third, by stock dividend.⁴ Forfeited stock may be reissued.⁵ Where a certificate of stock was drawn up in favor of a certain person, but retained in the stock-book, and a receipt indorsed thereon by the corporation for him, he was held never to have had such a delivery of it as to entitle him to any rights thereunder.⁶

1 Cook on Stock & Stockh. § 11.

2 *Supra*, CHAP. IV.

3 *Supra*, § 89.

4 *Infra*, CHAP. XII, DIVIDENDS.

5 *Currier v. Slate Co.* 56 N. H. 262; *State v. Smith*, 48 Vt. 266; *Taylor v. Miami etc. Co.* 6 Ohio, 176.

6 *York v. Passaic Rolling Mill Co.* 30 F. 471.

§ 251. The issue of stock dividends—When fictitious and fraudulent.—Stock may be issued by means of stock dividends only when the corporation

has been empowered to increase its capital stock, or when the full amount thereof originally authorized has not been issued.¹ Accumulated earnings on which no dividend has been declared furnish no consideration for issuing stock to be divided among the stockholders. Such a dividend would be *ultra vires*.² Stock is often fictitiously issued by means of stock dividends, where the dividend is a mere inflation of the stock of the company, with no corresponding values to answer to the stock distributed. This is commonly known as "watering" the stock. It is by far the easiest method of covering up fraudulent transactions of this nature, and one difficult to successfully attack. For unless forbidden by statute, as in Massachusetts and Wisconsin,³ or by constitutional prohibition as in Illinois,⁴ there is no rule of public policy invalidating in all cases the issue of stock dividends, "so long as every dollar of stock issued by a corporation is represented by a dollar of property."⁵

1 *Vide infra*, CHAP. XII, DIVIDENDS.

2 *Hatch v. Western Union Telegraph Co.* 9 Abb. N. Cas. 430.

3 *Mass. Pub. Stat.* ch. 112, § 61 (as to railway companies); *Wis. Rev. Stat.* (1878) § 1753.

4 *Ill. Const.* art. 11, § 13.

5 *Williams v. Western Union Telegraph Co.* 93 N. Y. 189; *Bailey v. Railroad Co.* 22 Wall. 604; *Howell v. Chicago etc. R'y Co.* 51 Barb. 378. *Cf. Hadley's Railroad Transportation*, 54, 55.

§ 252. Issue of stock for money—Validity of issue at less than par—The American rule.—The usual method of issuing stock is upon a subscription payable in money to the full amount of the face value of the shares.¹ Many cases have arisen, however, in which the directors of a company have agreed with the subscriber to issue shares to

him at less than their par value. In the absence of constitutional or statutory provisions making void stock fictitiously issued as "paid-up,"² it is not absolutely void but only voidable,³ at the instance of persons whose rights are thereby affected, and who can come into equity with clean hands. In England such agreements are sustained by the courts, even as against corporate creditors;⁴ but in America, while a contract of this nature, unless forbidden by statute, is binding as between the company and the subscriber, and will hold so long as the company remains solvent and able to meet all its obligations,⁵ it will not stand as against the claims of corporate creditors when the company has become insolvent.⁶ For the capital stock of a company being, according to the American doctrine, a trust fund for the payment of debts, the corporate creditors have a right, upon the insolvency of the company, to insist upon its being paid in full.⁷ Even the fact that a stockholder was induced to take the stock by the false representations of the president or directors of the company that it was full-paid stock, is no defense to an action by a corporate creditor to recover the difference between the amount paid and the par value of the stock.⁸ But persons dealing with a corporation and contracting with it, after having acquired knowledge of arrangements which limit the liability of the subscribers to pay the full amount of the capital stock, are held to have waived the right to compel the stockholders to contribute the full amount of their subscriptions in discharge of the corporate obligations.⁹ When the issue is for cash, it is not requisite, after showing that less than the

face value of the shares was accepted in payment, to prove also the fraudulent nature of the transaction, as is the rule with respect to payment in property,¹³ for in the former case there is no room for mistaken judgment.¹¹

1 *Supra*, CHAP. IV.

2 *Vide*, § 71, *supra*. Cf. § 93, *supra*.

3 *Vide*, § 72, *supra*.

4 *Infra*, § 254.

5 *Harrison v. Arkansas Valley R. R. Co.* 4 McCrary, 264. An issue for less than par may be forbidden by a statute not expressly prohibitory in terms. Thus the amendment of the charter of the Missouri Pacific Railway Company provides that any subscriber, upon making full payment for his shares, shall be entitled to have certificates of stock issued to him (Mo. Acts, 1851, p. 268); and this has been held to render it necessary that full payment should be made before the subscriber shall be entitled to demand the issue of certificates: *Spurlock v. Missouri Pacific R'y Co.* 90 Mo. 199.

6 *Sturgess v. Stetson*, 1 Biss. 246; *Fosdick v. Sturgess*, 1 Biss. 255; *Fisk v. Chicago etc. P. R. Co.* 53 Barb. 513; *O'Brien v. Chicago etc. P. R. Co.* 53 Barb. 563; *Mann v. Cook*, 20 Conn. 183; *Neuse River etc. Co. v. Commissioners*, 7 Jones, 275. And see *Oliphant v. Woodbury etc. Co.* 63 Iowa, 332; *Osgood v. King*, 42 Iowa, 478; *Green's Brice's Ultra Vires*, 143.

7 *Scovill v. Thayer*, 105 U. S. 143.

8 *Briggs v. Cornwall*, 9 Daly, 436; *Wood's Railway Law*, § 56.

9 *Young v. Erie Iron Co.* (1887), 65 Mich. 111, 823, citing *Robinson v. Bidwell*, 22 Cal. 379; *Coit v. North Carolina etc. Co.* 14 Fed. Rep. 12; *Morawetz on Corporations*, § 829.

10 *Vide infra*, §

11 *Flinn v. Bagley*, 7 Fed. Rep. 785.

§ 253. The same subject continued—Exception where the rule would be prejudicial to creditors—**Gratuitous issue.**—No agreement between the corporation and a subscriber, that he shall not be required to pay in full, is binding upon the corporate creditors, or their representative, the assignee or receiver.¹ But where a statute, enacted in the interest of corporate creditors, prohibiting the issue of corporate stock with attempted exemptions from full payment thereof, would if strictly construed, be prejudicial to their interests, it will be given a liberal construction.² Thus in a case where a

creditor of an insolvent corporation accepted in payment of his claims the valueless stock of the company to an amount in excess of the debt due him, it was held that he should not be held liable to corporate creditors, because the arrangement was to their advantage, diminishing the corporate liabilities without a corresponding diminution of assets.³ Accepting stock as a gratuity does not subject the holder to liability to corporate creditors. For, as was said in a recent case, a shareholder's liability on his stock arises not out of his relation to the corporation, but out of contract, either express or implied, or out of some statute; and accordingly, where no contract can be shown and no statute imposes liability upon a gratuitous allottee of shares, he commits no wrong upon the creditors and is not to be required to pay the full nominal face value of his stock.⁴

1 *Scovill v. Thayer*, 105 U. S. 143.

2 *Clark v. Bever*, 31 Fed. Rep. 670.

3 *Clark v. Bever*, 31 Fed. Rep. 670.

4 *Christensen v. Eno*, 106 N. Y. 97; 60 Am. Rep. 429.

§ 254. **The English rule as to issue below par.** By the Companies' Clauses Act of 1863,¹ the general power conferred upon corporations to dispose of unappropriated new shares of stock was limited by the requirement "that not less than the full nominal amount of any share or portion of stock be payable or paid in respect thereof." But this restriction was repealed by the Companies' Clauses Act of 1869,² and by the Railway Companies Act of 1867,³ while providing that every share in any company shall be deemed and taken to have been

issued and to be held subject to the payment of the whole amount thereof in cash, added the proviso, "unless the same shall have been otherwise determined by a contract duly made in writing and filed with the registrar of joint-stock companies at or before the issue of such shares,"⁴ thus making the validity of the contract to depend upon its registration.⁵ So that in England the price to be paid for stock is a matter of contract regardless of the face value of the shares.⁶ Or, as has been said, a person who has entered into a valid contract to take fully paid-up shares, cannot be made liable to the company or its creditors for shares not fully paid, which have been registered in his name;⁷ while an unregistered contract not to require full payment of the stock issued to a subscriber, is declared *ultra vires*.⁸ And the courts have declined to hold the taker of stock at less than par liable thereon because of the *ultra vires* nature of the issue; for, it is said, assuming that the contract was *ultra vires*, what would be the result? It can then be set aside only *in toto*, the consequence being that the holders would be entitled to be relieved of their shares and to receive back the money paid upon them.⁹

1 26 & 27 Vict. ch. 118, § 21.

2 32 & 33 Vict. ch. 48, § 5.

3 30 & 31 Vict. ch. 127, § 27.

4 30 & 31 Vict. ch. 131, § 25.

5 *In re London Celluloid Co.* Eng. Ct. of Appeal, May 31, 1883, reported in 4 R'y & Corp. Law J. 69, 70; *Watt v. Lee*, Eng. Ch. Div. Feb. 10, 1838, reported in 3 R'y & Corp. Law J. 430, where it was held that shares might even be issued by way of *bonus* if the contract under which it is done be duly registered.

6 *Guest v. Worcester R'y Co.* Law R. 4 Com. P. 9; *Baron De Beville's Case*, Law R. 7 Eq. 9; *Carling's Case*, 1 Ch. Div. 115, distinguishing *Ex parte Daniel*, 1 De Gex & J. 372.

7 *Ashworth v. Bristol etc. R'y Co.* 15 Law T. N. S. 561; *Guest v. Worcester etc. R'y Co.* Law R. 4 Com. P. 9.

8 *In re London Celluloid Co. Eng. Ct. of Appeal, May 31, 1883, reported in 4 R'y & Corp. Law J. 69, 70.*

9 *In re Ince Hall etc. Co. 30 Week. R. 945.*

§ 255. **Issue of stock for check or note.**—An issue of stock upon a subscription paid by check, cannot be objected to by another subscriber.¹ Stock may be issued also for promissory notes, under the corporate power to give credit and extend the time of payment of debts;² so also for bond and mortgage.³ In Wisconsin, stock may be issued for a note secured by real estate.⁴ In New York, however, stock cannot be issued for the subscriber's own note;⁵ and in Tennessee it is not to be issued for promissory notes; but the subscriber will be credited with the amount actually collected thereon.⁶ It has been held in California, however, that an issue of stock for a promissory note was valid, notwithstanding the provision in the constitution of that State that "no corporation shall issue stock except for money paid,"⁷ and notwithstanding a provision of the penal code declaring it a misdemeanor for any director of a corporation to vote to receive a note in payment of an assessment on a subscription of stock.⁸

1 *Thorp v. Woodhull, 1 Sand. Ch. 411.*

2 *Ogdensburg etc. R. R. Co v. Wooley, 3 Abb. N. Y. App. 398; Magee v. Badger, 30 Barb. 246; Vermont Central R. R. Co. v. Clays, 21 Vt. 30; Goodrich v. Reynolds, 31 Ill. 490; 83 Am. Dec. 240; Hardy v. Merriweather, 14 Ind. 203.*

3 *Valk v. Crandall, 1 Sand. Ch. (N. Y.) 179; Leavitt v. Pell, 27 Barb. 322.*

4 *Andrews v. Hart, 17 Wis. 297; Lyon v. Ewings, 17 Wis. 61; Western Bank v. Tallman, 17 Wis. 530; Clark v. Farrington, 11 Wis. 306; Blunt v. Walker, 11 Wis. 334; 78 Am. Dec. 709; Cornell v. Hichens, 11 Wis. 353.*

5 *N. Y. 1 Rev. Stat. ch. 18, tit. 4, § 2.*

6 *Moses v. Ocoll Bank, 1 Lea, 398.*

7 *Cal. Const. art. 12, § 11.*

8 *Cal. Penal Code, § 560; Pacific Trust Co. v. Dorsey (1887), 72 Cal. 55.*

§ 256. Issue of stock for property or services. When there is no statutory provision to the contrary, it is not now questioned that, in the absence of fraud, a corporation may issue its stock by way of payment in the purchase of property. This is on the principle that there is no need for the round-about process of first issuing the stock for money, and then paying the money for the property.¹ In New York, however, ten per centum of the preliminary subscriptions to the capital stock of railway companies is required by the General Railroad Act of 1850 to be paid in money,² so that only ninety per centum may be paid in property, or labor, or in such manner as the directors may require.³ For a subscription, payable by its terms in property or labor, is in the nature of a conditional subscription, and not to be taken into account in estimating whether the requisite amount of capital stock has been taken.⁴ But after the corporation has obtained its charter, stock may be issued upon subscriptions payable by their terms in labor or property.⁵ It has been held, under the New York act referred to above, that where the company has already received property from the subscriber to the amount of ten per centum of his subscription, it is not necessary for any purpose that the ceremony of paying the money by the company to the subscriber, and by him again to the company, should be gone through with.⁶ The issue of stock for property or services is a favor on the part of the corporation. It cannot be demanded as a right by the subscriber.⁷ An issue of stock by the directors of a corporation to themselves in return for property of their own, although to be carefully

scrutinized by the court, is not necessarily fraudulent.⁸ A corporation is made a purchaser for value by an acceptance on its part of a conveyance of land from a shareholder in payment of his subscription to the capital stock, whether it issues the certificate of stock or no.⁹

1 *Sanger v. Upton*, 91 U. S. 56, 60; *Burkinshaw v. Nichols*, Law R. 3 App. C. 1004, 1012; *Foreman v. Bigelow*, 4 Cliff. 508, 544; *Coffin v. Randall*, 110 Ind. 417; *Choteau v. Dean*, 7 Mo. App. 210; *Seawright v. Payne*, 6 Lea, 283; *Brante v. Ehlen*, 59 Md. 1; *Spargo's Case*, Law R. 8 Ch. 412. *Contra*, *Neuse River etc. Co. v. Commissioners*, 7 Jones, 275. *Cf.* *Henry v. Vermilion etc. R. R. Co.* 17 Ohio, 187.

2 N. Y. Laws of 1850, ch. 140, § 2. *Vide supra*, § 90.

3 *Cf.* N. Y. Laws of 1850, ch. 140, § 7.

4 *Vide supra*, § 138; *Erie etc. Plank Road Co. v. Brown*, 25 Pa. St. 156; *Pittsburgh etc. R. R. Co. v. Stewart*, 41 Pa. St. 54.

5 *Philadelphia etc. R. R. Co. v. Hickman*, 28 Pa. St. 318; *Dayton etc. R. R. Co. v. Hatch*, 1 Disn. 84.

6 *Beach v. Smith*, 30 N. Y. 116.

7 *Stoddard v. Shetucket etc. Co.* 34 Conn. 542; *Boston etc. R. R. Co. v. Wellington*, 113 Mass. 79; *Vermont Central R. R. Co. v. Claves*, 21 Vt. 30.

8 Thus where the trustees of a corporation, under a statute authorizing them to issue stock and transfer the same in exchange for property, such stock being declared by the statute to be deemed full-paid stock, and not subject to further calls, exchanged the entire capital stock for property of their own, they being the only members of the corporation, and afterwards divided the stock amongst themselves, and sold it as full-paid stock to innocent purchasers, an action could not be instituted by the purchasers to constrain an accounting on the part of the trustees to the corporation for fraudulently disposing of its stock: *Foster v. Seymour*, 23 Fed. Rep. 65.

9 *Frenkel v. Hudson*, 82 Ala. 158; 60 Am. Rep. 736.

§ 257. Issue of stock for property or services—
The English rule as to registration.—In England stock is deemed to be payable in money, unless a contract that it be otherwise payable shall be duly made in writing and filed with the registrar of joint-stock companies, at or before the issue of the shares.¹ But although there has been no registration, yet if the payment has been actually made in property, and there has been no fraud,² or if the services have been actually rendered,³ or if the pay-

ment in property is in the nature of a condition subsequent, the parties will be bound.⁴ So if the parties account with each other, and sums are stated to be due on one side, and sums to an equal amount due on the other side on that account, it is exactly the same thing as if the sums due on both sides had been paid.⁵ But if the accounts be not thus liquidated, and there is only an agreement that the property be taken in payment for the stock, a settlement in cash will be necessary upon a winding-up.⁶

1 30 & 31 Vict. ch. 131, § 25.

2 Jones's Case, Law R. 6 Ch. 48; Pell's Case, Law R. 5 Ch. 11; Drummond's Case, Law R. 4 Ch. 772; Maynard's Case, 22 Week. R. 119; Shroeder's Case, Law R. 11 Eq. 131.

3 Ex parte Clark, Law R. 7 Eq. 550.

4 Bridger's Case, Law R. 5 Ch. 305; Simpon's Case, Law R. 4 Ch. 184; Elkington's Case, Law R. 2 Ch. 527; Thompson's Case, 34 Law J. Ch. 525; Fisher's Case, 53 Law T. 832; Sherrington's Case, 34 Week. R. 49; Cook on Stock & Stockh. §§ 18, 35.

5 Spargo's Case Law R. 8 Ch. 407; Pell's Case, Law R. 5 Ch. 11; Ex parte Clark, Law R. 7 Eq. 550; Nicoll's Case, 7 Ch. Div. 533; Maynard's Case, 22 Week. R. 119; *In re Vulcan Iron Works*, Law T. May, 1885, p. 61.

6 Rowland's Case, 42 Law T. N. S. 785; Crickmer's Case, Law R. 10 Ch. 614; Fotheringill's Case, Law R. 8 Ch. 270; Dent's Case, Law R. 15 Eq. 407.

§ 258. Distinction between an issue for property or services and a "sale" of stock.—The issue of stock for property, labor or contract work need not be necessarily accompanied by the formality of a subscription.¹ When there has been no subscription, but the issue has been made merely by way of payment for property or services, it is common to speak of the transaction as a sale of stock; but as "we have seen no case which recognizes a difference between those stockholders who became such in pursuance of a written agreement, and those

who became such by the mere acceptance of stock issued to them,"² it is doubtful whether any clearness of ideas is obtained, under any circumstances, by calling an original issue of stock a sale of stock, the latter term being otherwise appropriated to designate a transfer of stock, or an agreement to transfer, made by its holder with some other person.³

1 Cook on Stock & Stockh. § 17, citing *Western Bank v. Tallman*, 17 Wis. 530; *Clark v. Harrington*, 11 Wis. 306; *Reed v. Hayt*, 51 N. Y. Super. Ct. 121; *Jackson v. Traer*, 64 Iowa, 469; 52 Am. Rep. 449.

2 *Jackson v. Traer*, 64 Iowa, 469; 52 Am. Rep. 449.

3 Cook on Stock & Stockh. § 17, and cases there cited.

§ 259. **What property may be received.**—An issue of stock may be made for whatever represents to the corporation a fair, just, lawful and needed equivalent for the money subscribed,¹ whatever property it is within its powers to buy,² whatever is suitable with respect to the object of its incorporation.³ For example, it has been held that stock may be issued for cross-ties to be used in the construction of the road;⁴ for real estate such as the corporation might legally purchase;⁵ for a waiver of right to damages;⁶ for canceling a debt of the company past due,⁷ or not yet due;⁸ for newspaper advertising of the scheme;⁹ for stock in a coal company carrying on a supplementary business;¹⁰ for construction work on another railway with which the company had the power to amalgamate;¹¹ and in general for labor, construction work, materials and land; provided always that these transactions are entered into and carried out in good faith.¹² Thus, it has been decided that the receiver of a corporation cannot, in the absence of fraud, maintain

an action for the purpose of collecting, as unpaid subscriptions, the difference between what is claimed to be the actual value of property, received by the corporation from certain subscribers as payment for their subscriptions, and the amount of the subscriptions, the property appearing to have been such as was needed by the company in the course of its legitimate business.¹³

1 *Liebke v. Kaupp*, 79 Mo. 22; 49 Am. Rep. 212; *Haywood etc. Plank Road Co. v. Bryan*, 6 Jones, 82.

2 *Coffin v. Randsell* (1887), 110 Ind. 417; *Brant v. Ehlen*, 59 Md. 1; *American Silk Works v. Salomon*, 4 Hun, 135.

3 *Green's Brice's Ultra Vires* (3rd ed.), 135; *Angell & Ames on Corporations* (11th ed.), § 517.

4 *Ohio etc. R. R. Co. v. Cramer*, 23 Ind. 490.

5 *Cincinnati etc. R. R. Co. v. Clarkson*, 7 Ind. 595.

6 *Philadelphia etc. R. R. Co. v. Hickman*, 28 Pa. St. 318.

7 *Carr v. LeFevre*, 27 Pa. St. 413; *Reed v. Hayt*, 51 N. Y. Super. Ct. 121.

8 *Appleyard's Case*, 49 Law J. Ch. 290.

9 *Liebke v. Kaupp*, 79 Mo. 22; 49 Am. Rep. 212.

10 *East New York etc. R. R. Co. v. Lighthouse*, 4 Rob. (N. Y.) 407.

11 *Branch v. Jessup*, 106 U. S. 468.

12 *Branch v. Jessup*, 106 U. S. 468; *Bedford County v. Nashville etc. R. R. Co.* 14 Lea, 525; *Philadelphia etc. R. R. Co. v. Hickman*, 28 Pa. St. 318; *Clark v. Farrington*, 11 Mis. 306.

13 *Coffin v. Randsell*, 110 Ind. 417.

§ 260. Issue of stock for property or services taken at an overvaluation—It has been argued that where property has been taken at an overvaluation, the taker of the shares should be held liable for the difference between their face value and the actual value of the property. But it is held that, as such a transaction cannot be attacked at all except for fraud, and that as, if fraudulent, it is altogether void, the court will not make a new contract for the parties and say to the purchaser, "though you have bargained for paid-up shares, we will change that into a bargain to take shares

not paid-up, and put you on the list of contributors on that ground.”¹ The utmost that can be done is to “take away any profit from the person who has improperly made it.”² Accordingly, while the contract stands unimpeached for fraud, the courts, even where the rights of creditors are involved, will treat that as a payment which the parties have agreed should be payment.³

1 *Anderson's Case*, 7 Ch. Div. 75; *Scoville v. Thayer*, 105 U. S. 143, 156; *Phelan v. Hazard*, 5 Dill. 45; *Van Cott v. Van Brunt*, 82 N. Y. 535. *Acc. Continental Telegraph Co. v. Nelson*, 49 N. Y. Super. Ct. 197; *Brant v. Ehlen*, 59 Md. 1; *Crawford v. Rohrer*, 59 Md. 599; *Wood's Claim*, 9 Week. R. 366; *Barnett's Case*, Law R. 18 Eq. 507; *Currie's Case*, 3 De Gex, J. & S. 357. Apparently *contra*, *Wetherbee v. Baker*, 35 N. J. 501, where, however, there was a total failure of consideration, the purchaser having no title to the property; and also, *Ohisholm Bros. v. Forney*, 65 Iowa, 140. *Cf. Savage v. Bull*, 17 N. J. Eq. 142; *Jackson v. Traer*, 64 Iowa, 499; 52 Am. Rep. 449.

2 *Anderson's Case*, 7 Ch. Div. 75; *Four Mile etc. R. R. Co. v. Bailey*, 18 Ohio St. 208.

3 *Phelan v. Hazard*, 3 Dill. 45; *Coffin v. Randsell*, 110 Ind. 417.

§ 261. Overvaluation.—Whether fraud must be proven.—In a case decided by the court of appeals of New York, the bench was evenly divided upon the question, whether or no, after having shown that the property given in payment of shares was taken at an overvaluation, it was necessary for the plaintiff to further prove that it was so done knowingly and with fraudulent intent.¹ When stock is issued for property or services, it is very different from those cases in which subscriptions to stock are payable in cash, and where only a part of the installments has been paid. In those cases there is still a debt due to the corporation, which, if it becomes insolvent, may be sequestrated in equity by the creditors as a trust fund liable to the payment of their debts. But where full-paid stock is issued for property received, there must be

actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account.² Accordingly, it is now well settled that in order for the court to find a fraud in law, there must be shown either an intentional fraud in fact, or such reckless conduct in the valuation without regard to the real value of the property as would indicate, without explanation, an intent to defraud.³ But if the overvaluation was not knowingly and intentionally made, the contract will stand; for taking property at a prospective value never realized is an error of judgment merely, and in the absence of fraud it forms no ground for the rescission of the contract.⁴ While a gross and obvious overvaluation of property would be strong evidence of fraud;⁵ yet it has been held that the fact that the property accepted in payment of stock was not worth more than one-fifth of the valuation set upon it, although presumptive evidence of fraud, does not charge the incorporators with constructive fraud where they are shown to have made their valuation honestly.⁶ The conditions existing at the time the estimate was made should be the criterion of judging the good faith of the parties;⁷ for so long as the transaction stands unimpeached for actual fraud, the holders of stock to whom it has been issued for payment in property ought not, at the instance of creditors, to be held personally liable for the debts of the company because the valuation fairly made at that time proves at a later day, under the changes wrought by subsequent events, to have been less than its actual value.⁸

1 *Boynton v. Hatch*, 47 N. Y. 225.

2 *Cott v. North Carolina etc. Co.* 119 U. S. 343.

3 *Young v. Erie Iron Co.* (1887), 65 Mich. 111; *Coit v. North Carolina etc. Co.* 119 U. S. 343; *Coffin v. Randsell* (1887), 110 Ind. 417; *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87; *Douglass v. Ireland*, 73 N. Y. 100; *Boynton v. Andrews*, 63 N. Y. 93; *Schenck v. Andrews*, 57 N. Y. 134.

4 *Carr v. Le Fevre*, 27 Pa. St. 413; *Schroeder's Case*, Law R. 11 Eq. Cas. 131.

5 *Coit v. North Carolina etc. Co.* 119 U. S. 343; *Van Cott v. Van Brunt*, 82 N. Y. 535; *Boynton v. Hatch*, 47 N. Y. 225; *Carr v. Le Fevre*, 27 Pa. St. 413. And see cases cited *infra*, § 262.

6 *Young v. Erie Iron Co.* 31 N. Y. Rep. 814. For other examples, *vide infra*, § 262.

7 *Schenck v. Andrews*, 57 N. Y. 133.

8 *Coit v. North Carolina etc. Co.* 14 Fed. Rep. 12; S. O. 119 U. S. 343. Cf. *Coffin v. Randsell*, 110 Ind. 417.

§ 262. Whether fraudulent intent is a question of fact or of law.—Although it is generally the province of the jury to determine whether property has been accepted for the issue of shares at an overvaluation, and whether there was a fraudulent intent in so doing,¹ yet in cases in which the evidence shows the overvaluation to have been so excessive that it appears upon its face intentional, the court will itself, as a presumption of law, pronounce the transaction fraudulent, unless it be reasonably explained.²

1 *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87; *Boynton v. Hatch*, 47 N. Y. 225; *Draper v. Beadle*, 16 Week. Dig. 475; *Bolz v. Ridder*, 19 Week. Dig. 463.

2 *Douglass v. Ireland*, 73 N. Y. 100, where property worth \$64,000 was valued at \$300,000; *Boynton v. Andrews*, 63 N. Y. 93, where property worth \$50,000 was taken at \$100,000; *Osgood v. King*, 42 Iowa, 478, where the property was worth \$27,000 and stock was issued to the amount of \$190,000. But see *Bolz v. Ridder*, 19 Week. Dig. 463, where a patent right valued at one time at \$1,000 being afterwards sold for shares to the amount of \$100,000, was held only presumptively fraudulent, and sufficiently capable of explanation to be submitted to the jury. See *Cook on Stock & Stockh.* § 34, where these cases are set forth.

§ 263. The validity of a fictitious issue may be impeached by the State—Not to be questioned by the corporation.—When the issue of stock at less than par amounts to a fraud upon the public, it would seem that the attorney-general of the State

may prevent its issue by injunction, or by other legal proceedings have the transaction set aside.¹ The company itself, however, is in no position to question the validity of the transaction, an agreement to accept less than the face value of the shares as payment in full being binding upon it.² Neither can the company compel specific performance of a contract to take shares below par, for to carry out its own part of such an agreement would be an *ultra vires* act.³ But the corporation, as in other cases of *ultra vires* or fraudulent acts, has its remedy against the directors.⁴

1 Green's Brice's *Ultra Vires*, 3rd ed. 708, 709; Cook on Stock & Stockh. § 37. Cf. *Holman v. State*, 105 Ind. 569; *Jersey City etc. Co. v. Dwight*, 29 N. J. 242; *Erie R'y Co. v. Casey*, 26 Pa. St. 287, 318.

2 *Scoville v. Thayer*, 105 U. S. 143, a dictum to that effect.

3 *Western R'y Co. v. Mowatt*, 12 Jur. pt. 1, 407. *Vide supra*, § 93.

4 Cook on Stock & Stockh. § 48.

§ 264. A fictitious issue not to be set aside nor to be enforced at the suit of participating or acquiescing shareholders.—Stockholders who are parties to the transaction by which stock has been issued to them for less than the face value of the shares, or who, having knowledge of such an issue being made, have acquiesced therein, are estopped from questioning the legality of the issue;¹ unless the issue were absolutely void by statute.² The participating subscriber cannot withdraw and recover back the money already paid;³ neither will *mandamus* lie at the suit of a subscriber to compel the issue of shares at less than par in pursuance of a resolution of the stockholders that it be so issued.⁴ The parties will be left in the position in which they have placed themselves.⁵ If the shareholders participating in the issue disagree among themselves as

to the division of the stock, the courts will not render aid to one as against the others.⁶

1 *Scoville v. Thayer*, 105 U. S. 143. *In re Gold Co.* 2 Ch. Div. 701, 712.

2 *Knowlton v. Congress etc. Co.* 14 Blatchf. 364, 368; S. C. 104 U. S. 49, reversing S. C. 57 N. Y. 518.

3 *Clark v. Lincoln Lumber Co.* 49 Wis. 655; *Goff v. Hawkeye etc. Co.* 62 Iowa, 691.

4 *State v. Teinken*, 48 N. J. 87.

5 *Knowlton v. Congress etc. Co.* 57 N. C. 518, 537; S. C. *contra*, 14 Blatchf. 364, and 103 U. S. 49. But on the removal of this case to the federal court it was said *obiter* that "the cases are numerous where courts of equity have interferred to prevent the consummation of a wrong upon the motion of a party who was instrumental in its inception": *Knowlton v. Congress etc. Co.* 14 Blatchf. 364, 368; S. C. 103 U. S. 49, reversing S. C. 57 N. Y. 518.

6 *Tobey v. Robinson*, 99 Ill. 202.

§ 265. The remedy of dissenting shareholders.—Any stockholder dissenting at the time, or not acquiescing in the improper issue of stock below par, may, by bill in equity, have the whole proceeding set aside,¹ and the issue canceled.² And the court may enjoin any transfer of the stock, and appoint a receiver to take possession of the funds realized from the improper issue, using them in retiring the stock and for paying the damages caused by the fraud.³ It has been said *obiter* that the court may cause so much of the issue to be withdrawn as will leave with the guilty purchasers shares whose par value equals the amount of money actually paid in.⁴

1 *Fisk v. Chicago etc. R. R. Co.* 53 Barb. 513.

2 *Gilman etc. R. R. Co. v. Kelly*, 77 Ill. 426; *Campbell v. Morgan*, 4 Bradw. 100.

3 *Fisk v. Chicago etc. R. R. Co.* 53 Barb. 513. See Cook on Stock & Stockh. § 41.

4 *Sturgess v. Stetson*, 1 Biss. 246, 254; *Fosdick v. Sturgess*, 1 Biss. 255, 259.

§ 266. The remedy of corporate creditors—The American rule.—The remedy of the creditors of

an insolvent corporation against a subscriber holding shares under an agreement with the directors to issue below par, is by bill in equity to set the agreement aside and to compel the stockholder to pay the balance due.¹ In New York it is provided by statute that each stockholder shall be individually liable to corporate creditors to an amount equal to the amount unpaid on the stock held by him,² or such proportion of that sum as shall be required to satisfy the debts of the company.³ And generally, in the American States, corporate creditors may impeach the validity of an issue of stock below par made prior to their having extended credit to the company, and may compel payment in full, or so much as is required to satisfy their claims against the company;⁴ for, although an agreement to accept less than the face value of the shares may be binding upon a solvent company, it is a fraud in law upon its creditors, which they may set aside; and when their rights intervene and their claims are to be satisfied, the stockholders can be required to pay their stock in full.⁵ But a corporate creditor cannot object to an issue below par of new capital stock, the increase having been made after he had extended credit to the company; for in such a case he cannot be presumed to have acted upon the faith of the increased capital stock being issued for its full face value.⁶ The stockholders cannot be compelled to pay more of the balance due upon their shares than is sufficient to satisfy the claims of the corporate creditors.⁷ It has been held that the custom of the country will exempt stockholders from liability on stock fictitiously issued as paid up; but, says Mr. Cook, such

a decision is inconsistent with the great weight of authority, and must be considered poor law.⁸ The statute of limitations does not begin to run against the creditors' right to object to an issue of stock below par until they have brought suit against the corporation upon the debts owing them, and have recovered judgment.⁹

1 *Scoville v. Thayer*, 105 U. S. 143; *Rider v. Morrison*, 54 Md. 429; *Wetherbee v. Baker*, 35 N. J. Eq. 501.

2 General Railroad Act of 1850, N. Y. Laws of 1850, ch. 140, § 10, as amended by laws of 1854, ch. 282, § 16.

3 1 N. Y. Rev. Stat, tit. 3, ch. 18, § 5.

4 *Sagory v. Dubois*, 3 Sandf. Ch. 466, 499.

5 *Scoville v. Thayer*, 105 U. S. 143; *Hawley v. Upton*, 102 U. S. 314; *Pullman v. Upton*, 96 U. S. 323; *Chubb v. Upton*, 95 U. S. 666; *Webster v. Upton*, 91 U. S. 65; *Sanger v. Upton*, 91 U. S. 56; *Upton v. Tribilcock*, 91 U. S. 45; *Upton v. Burnham*, 3 Biss. 431; S. C. 3 Biss. 520; *Upton v. Hansbrough*, 3 Biss. 417; *Myers v. Suley*, 10 Nat. Bank. Reg. 411; *Flinn v. Bagley*, 7 Fed. Rep. 785, and cases therein reviewed and cited; *Union etc. Co. v. Frear etc. Co.* 97 Ill. 537, and cases there reviewed; *Hinkling v. Wilson*, 104 Ill. 54; *Christensen v. Eno*, 105 N. Y. 97; 60 Am. Rep. 429; *Eyerman v. Kriekhaus*, 7 Mo. App. 435; *Fisher v. Seligman*, 7 Mo. App. 383; *Shrainka v. Allen*, 7 Mo. App. 434; *Pickering v. Templeton*, 2 Mo. App. 424; *Northrop v. Bushnell*, 33 Conn. 498; *Mann v. Cooke*, 20 Conn. 178.

6 *Coit v. North Carolina etc. Co.* 14 Fed. Rep. 12.

7 *Scoville v. Thayer*, 105 U. S. 143, 155. Cf. *Slee v. Bloom*, 19 Johns. 456; 10 Am. Dec. 273.

8 *Cook on Stock & Stockh.* § 42, citing *In re South Mountain etc. Co.* 7 Sawy. 30.

9 *Christensen v. Quintard*, 33 Hun, 334.

§ 267. **The remedy of corporate creditors—The English rule.**—In England the creditors of the company cannot question the validity of an issue of stock below par for the purpose of holding the share-owners liable for the unpaid balance, except where the company itself might hold them liable. If the company cannot question the transaction, "neither can a creditor, for he can obtain nothing but what the company can get from the shareholders;"¹ and it seems "to be quite settled" in that country that the rights of creditors against the

shareholders when enforced by a liquidator (receiver), "must be enforced by him in right of the company; what is to be paid by the shareholders is to be recovered in that right."² Accordingly, a person who has entered into a valid agreement to take fully paid-up shares cannot be made liable to the company or its creditors for shares not fully paid, although registered in his name.³ The American doctrine that the capital stock of a corporation is a trust fund for the benefit of corporate creditors has never been recognized in England.⁴

1 In re Dronfield etc. Co. 17 Ch. Div. 76; In re Ambrose etc. Co. 14 Ch. Div. 390; In re Ince Hall etc. Co. 30 Week. R. 945.

2 *Waterhouse v. Jamieson*, Law R. 2 H. L. 29, 37.

3 *Ashworth v. Bristol etc. R'y Co.* 15 Law T. N. S. 561; *Guest v. Worcester etc. R'y Co.* Law R. 4 Com. P. 9.

4 *Cook on Stock & Stockh.* § 43. *Vide supra*, § 252. The American doctrine is fully explained in *Brant v. Ehlen*, 59 Md. 1. See also *Crawford v. Rohrer*, 59 Md. 599.

§ 268. Remedies of transferees of fictitiously issued stock.—The transferee of shares issued below par stands upon no higher footing than the original participating taker of the stock, as regards any general remedy invalidating the whole transaction.¹ His own title being tainted with the same fraud, he cannot bring suit in behalf of the corporation and other stockholders against the parties participating in the issue.² The transferee has, however, his remedy for damages against those who induced him to purchase, or without whose wrongful acts the fraud could not have been practiced upon him.³ But a purchaser of the stock is not injured by the transaction unless he has paid more for it than it was worth; and every purchaser stands upon the particular circumstances of his purchase.⁴ The

burden is upon the plaintiff to show that a representation was made that the stock was fully paid up; that he relied upon the representation, and that it was false and fraudulent.⁵ The transferee of stock issued below par may, at any time before the performance of the contract of purchase, refuse to take the shares or to pay therefor;⁶ or even after completion of the transfer and payment of the purchase price, he may rescind the contract with his vendor and recover the payment.⁷

1 Cook on Stock & Stockh. § 40.

2 Nott v. Clews, 14 Abb. N. Cas. 437; Parsons v. Hays, 14 Abb. N. Cas. 419; Flagler Co. v. Flagler, 19 Fed. Rep. 468; S. C. 14 Abb. N. Cas. 435; Langdon v. Fogg, 18 Fed. Rep. 5.

3 Cross v. Sackett, 6 Abb. Pr. 247; Barnes v. Brown, 80 N. Y. 527; In re Ambrose etc. Co. 14 Ch. Div. 390, 397; In re Gold Co. 11 Ch. Div. 701, 713, 714.

4 Foster v. Seymour, 23 Fed. Rep. 65.

5 McAleer v. McMurray, 58 Pa. St. 126; Priest v. White, 34 Abb. Law J. 298.

6 Sturgess v. Stetson, 1 Biss. 246, 253; Coolidge v. Goddard, 77 Me. 579

7 Fosdick v. Sturgess, 1 Biss. 255.

§ 269. When transferees of fictitious stock are affected with notice.—The transferee may rely upon the statements contained in the certificate of stock to the effect that it has been paid in full,¹ or upon the statements to that effect upon the books of the company.² And even although there be no statement upon the face of the certificate that the share represented thereby has been fully paid, yet if it be “in customary form,”³ and offered for sale in open market, the modern tendency is to hold that a purchaser may accept it, asking no questions for conscience sake.⁴ “The purchaser is not bound to suspect fraud when everything seems fair.”⁵ Any other doctrine would virtually destroy the transfer-

able nature of such securities and paralyze all the dealings of the stock exchange.⁶ And although the customary form has not been followed, yet if the form and contents of the certificate of stock be not prescribed by the charter or by-laws of the company, and they contain no requirement that it be signed by designated officers of the corporation or be issued with certain formalities, it is no defense to an action thereon for the company to plead that the issue was not made in accordance with the method usually employed, and that therefore the purchaser had notice of its illegality.⁷ When, however, formalities of this kind are required by the charter, the purchaser is then affected with knowledge, and if they be not complied with, the corporation cannot be held liable.⁸

1 *Young v. Erie Iron Co.* (1887), 65 Mich. 111; *Foreman v. Bigelow*, 4 Cliff. 508; *Hubbell v. Meigs*, 50 N. Y. 480, 489; *Wintringham v. Rosenthal*, 25 Hun, 580; *Jackson v. Sligo etc. Co.* 1 Lea, 210; *Protection Life Ins. Co. v. Osgood*, 93 Ill. 69. Cf. *Crickmer's Case*, Law R. 10 Ch. 614. But see *Mann v. Currie*, 2 Barb. 294; *Tasker v. Wallace*, 6 Daly, 364, 374, *obiter*; and cases cited *infra*.

2 *Erskine v. Loewenstein*, 11 Mo. App. 595.

3 *Johnson v. Sullivan*, 15 Mo. App. 55.

4 *Foreman v. Bigelow*, 4 Cliff. 508; *Johnson v. Sullivan*, 15 Mo. App. 55; *Keystone Bridge Co. v. McOheney*, 8 Mo. App. 496; *Erskine v. Loewenstein*, 11 Mo. App. 595.

5 *Brant v. Ehlen*, 59 Md. 1; *Burkinshaw v. Nicolls*, Law R. 3 App. O. 1004, 1017.

6 See *Brant v. Ehlen*, 59 Md. 1.

7 *Tome v. Parkersburg etc. R. R. Co.* 39 Md. 36; 17 Am. Rep. 540; *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Cook on Stock & Stockh.* § 294.

8 *Holbrook v. Fauquier etc. Turnpike Co.* 3 Oranch, 425. Cf. *Wright's Appeal*, 99 Pa. St. 425.

§ 270. The liability of transferees of fictitiously issued stock.—Purchasers with notice are liable in the same manner as the original takers of the stock;¹ but where shares are issued as “fully paid,”

and have, by transfer from the original subscriber, come into the hands of a *bona-fide* purchaser without notice, there is no ground on which a promise can be implied on the part of the latter to be answerable either to the company or its creditors should the representations on the faith of which he purchased prove to be false. He cannot be held liable on the ground of contract, because he never agreed to purchase any other than fully paid shares; and if it be said that the shares were fraudulently issued he cannot be held liable on the ground of fraud, because he was in no sense a party thereto.² If a subscriber to whom shares have been allotted transfers them to a *bona-fide* purchaser before the certificate of stock has been issued, and the certificate is then issued directly to the transferee, the latter does not thereby become the original taker of the stock so as to lose his equities as a *bona-fide* purchaser without notice, and, accordingly, is not liable to corporate creditors if the shares, issued as full-paid stock, were in fact issued below par, or for property taken at an overvaluation.³ Where it is deemed necessary to the protection of the purchaser that there should be an official representation upon the face of the certificate or on the corporate records that the stock has been paid in full, it is only such a representation that the full payment has *actually been made* that will save him. No agreement on the part of the corporation not to require further payment,⁴ no writing of such words as "non-assessable" across the certificate of stock, is equivalent to a recital contained *thereon* that it *has been* fully paid.⁵

1 *Upton v. Tribilcock*, 91 U. S. 45.

2 *Brant v. Ehlen*, 59 Md. 1; *Waterhouse v. Jamieson*, Law R. 2 H. L. 23; *Steacy v. Little Rock etc. R. R. Co.* 5 Dill. 348; *Burkinshaw v. Nichols*, Law R. 3 App. C. 1004. Some cases go so far as to hold that the attack upon the transaction for fraud must be made directly, and made "while the stock is in the hands of the original takers of it, or of those purchasing with full knowledge of or with participation in the fraud." *Young v. Erie Iron Co.* (1887), 65 Mich. 111, citing *Douglass v. Ireland*, 73 N. Y. 100; *Boynton v. Andrews*, 63 N. Y. 93; *Boynton v. Hatch*, 47 N. Y. 225; *Schenck v. Andrews*, 57 N. Y. 134; *Phelan v. Hazard*, 5 Dill. 45; *Smith v. North American etc. Co.* 1 Nev. 423; *Goodrich v. Reynolds*, 31 Ill. 490; 83 Am. Dec. 420; *Spencer v. Iowa Valley etc. Co.* 36 Iowa, 407, 411; *Steacy v. Little Rock etc. R. R. Co.* 5 Dill. 384. But see *Meyers v. Seeley*, 10 Nat. Bank. Reg. 411, where it is held that the assignee of shares can stand upon no firmer ground than the assignor; that although relying upon the representations of the latter, and of the corporate officers, that the stock was fully paid, he will, as against creditors of the company, be liable for the amount remaining unpaid.

3 *Young v. Erie Iron Co.* (1887), 95 Mich. 111, citing *Sanger v. Upton*, 91 U. S. 56, 60; *Steacy v. Little Rock etc. R. R. Co.* 5 Dill. 348, 373-379. See also *Carling's Case*, 1 Ch. Div. 115. *Contra, In re Vulcan Iron Works*, Law T. 1885, p. 61; *Rowland's Case*, 42 Law T. N. S. 785; *Potter's Appeal*, W. N. 1878, p. 81.

4 *Upton v. Tribilcock*, 91 U. S. 45; *Webster v. Upton*, 91 U. S. 65. *Vide supra*, § 93.

5 *Upton v. Burnham*, 3 Biss. 431.

§ 271. **The liability of corporate officers for a fictitious issue of stock.**—The corporate officers by whose means stock has been fictitiously issued as paid up, may be held liable to the company for breach of trust, the measure of their liability being the excess of the market value of the stock over the amount received by the company therefor.¹ And if there be collusion between the corporate officers and the persons to whom the shares are issued, by which the profits of the transaction are divided between them,² and either directly or indirectly the directors have participated in the profits of the issue, they may be held liable, not only by the corporation,³ but also by *bona-fide* transferees of the stock, for the damages suffered by them.⁴ It has been held, however, that when no creditors' rights are involved, and all the shareholders of the corporation have acquiesced, the directors will not

be liable to the company with respect to profits accruing to them from an issue of shares for property grossly overvalued.⁵ But in such a case it would seem that the company might properly claim that "the arrangement should enure to and for the benefit of the company."⁶ In Massachusetts there is a statute providing that when the officers of a corporation have issued stock for property taken at an unfair valuation, they shall become liable for the debts of the company.⁷

1 Cook on Stock & Stockh. § 48.

2 Douglas v. Ireland, 73 N. Y. 100; De Ruvigne's Case, 5 Ch. Div. 316; Carling's Case, 1 Ch. Div. 115; Currie's Case, 3 De Gex, J. & S. 367.

3 Flagler etc. Co. v. Flagler, 19 Fed. Rep. 468; Continental Telegraph Co. v. Nelson, 49 N. Y. Supr. Ct. 197; Nott v. Clews, 11 Abb. N. Cas. 437; Osgood v. King, 42 Iowa, 478. Cf. Langdon v. Fogg, 18 Fed. Rep. 5; S. C. 14 Abb. N. Cas. 435.

4 Cross v. Sackett, 6 Abb. Pr. 247; In re Gold Co. 11 Ch. Div. 701.

5 In re Ambrose & Co. 14 Ch. Div. 390.

6 Van Cott v. Van Brunt, 82 N. Y. 535, 541.

7 Mass. Acts of 1875, ch. 177, § 2.

§ 272. **Overissued stock.**—A corporation with a fixed capital divided into a fixed number of shares can have no power of its own volition, or by any act of its officers or agents, to enlarge its capital or increase the number of shares into which it is divided. The supreme legislative power of the State can alone confer that authority and remove or consent to the removal of the restrictions which are a part of the fundamental law of the corporate being;¹ accordingly, spurious stock attempted to be created in excess of the capital stock of the company, forms no part thereof and is "utterly invalid,"² even in the hands of *bona-fide* purchasers,³ whether the issue has been directed by the corporation itself, or whether it has been made by its agents without

such authority;⁴ and the company is entitled to have all certificates and transfers which represent such spurious stock declared void and ordered to be canceled.⁵ And in an action on the contract against the company, it will not be estopped from setting up its want of corporate power to issue the spurious certificates.⁶

1 *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, 49.

2 *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, 49.

3 *Scovill v. Thayer*, 105 U. S. 143; *Bruff v. Mall*, 36 N. Y. 200; *People v. Parker etc. Co.* 10 How. Pr. 543; *Wright's Appeal*, 99 Pa. St. 425; *Peoples' Bank v. Kurtz*, 99 Pa. St. 344.

4 *Scoville v. Thayer*, 106 U. S. 143; *Railway Co. v. Allerton*, 18 Wall. 233; *Mechanics' Bank v. New York etc. R. R. Co.* 13 N. Y. 599; *New York etc. R. R. Co. v. Ketcham*, 3 Keyes, 353; *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30 (the last three cases named, growing out of the Schuyler frauds); *Stace's Case*, Law R. 4 Ch. 688, note.

5 *New York etc. R. R. v. Schuyler*, 34 N. Y. 49.

6 *Wood's Railway Law*, § 93, citing *Hood v. New York etc. R. R. Co.* 22 Conn. 502.

§ 273. **Liability of the corporation in damages for injury caused by overissue.**—While the corporation is not liable to the holder of overissued stock *ex contractu*, it is answerable in damages, *ex delicto*, for the fraud which it has practiced upon him, or rendered possible for others to perpetrate to his injury.¹ For a corporation is liable to the same extent and under the same circumstances as a natural person for the consequences of its wrongful acts, and will be held to respond in a civil action for every grade and description of forcible, malicious, or negligent tort or wrong which it commits, however foreign to its nature or beyond its granted powers the wrongful transaction may be.² So that if it be well established that the corporation itself issued the false certificates of stock and permitted the fraudulent transfers of spurious stock,

it will be liable to the party directly deceived and injured by that transaction. "The incapacity to create the spurious stock would be no defense to an action for damages for the injury."³ The liability of a corporation for an injury growing out of acts of its directors in excess of the charter powers was established by the court of chancery in England a century ago,⁴ and in this country has been vindicated and settled by decisions of the New York court of appeals.⁵ In the leading case on this subject, it is said, that if the act of the agent can be charged home upon any principle to the corporation, then the *bona-fide* holder of any certificate issued by the transfer agents has a primary and direct claim, either to be admitted as a corporator, or, if that is impracticable, from the excessive issue of stock, to be compensated for the fraud practiced upon him. To entitle the aggrieved party to sue in cases of this kind, no privity is necessary except such as is created by the unlawful act and the consequential injury, because the injured party is not seeking redress upon contract, but purely for the tortious act, in the commission of which the contract is an accidental incident.⁶ The same principle applies whether the spurious stock be in the hands of the original subscriber or of his *bona-fide* transferee. For the duties of the corporation in respect to its stock are not limited to itself and existing shareholders. They extend also to the commercial community whose confidence and trade the company invites, and who in turn are entitled to good faith and fair dealing at its hands; and they spring into full vigor in behalf of every party who enters into dealings with respect to its stock.⁷

1 *Bruff v. Mali*, 36 N. Y. 200; *Titus v. Great Western Turnpike Co.* 5 Lans. 250; *U. C. 61 N. Y.* 237; *Western etc. R. R. Co. v. Franklin Bank*, 60 Md. 36; *Tome v. Parkersburg etc. R. R. Co.* 39 Md. 35; 17 Am. Rep. 540; *Mandelbaum v. North American Mining Co.* 4 Mich. 465; *Wright's Appeal*, 59 Pa. St. 425; *People's Bank v. Kurtz*, 90 Pa. St. 344; 44 Am. Rep. 112; *Willis v. Fry*, 13 Phil. 33; *Willis v. Philadelphia etc. R. R. Co.* 6 Week. N. Cas. 461; *Bridgeport Bank v. New York etc. R. R. Co.* 30 Conn. 231 (one of the Schuyler fraud cases); *Hall v. Rose Hill etc. Road Co.* 70 Ill. 673; *Simm v. Anglo-American Telegraph Co.* 5 Q. B. Div. 188; *In re Eshie etc. R'y Co.* Law R. 3 Q. B. 584, 585; *Daly v. Thompson*, 10 Mees. & W. 309; *Waterhouse v. London etc. R'y Co.* 41 Law T. N. S. 553; and cases cited *infra*.

2 *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, 49; *Life & Fire Ins. Co. v. Mechanics' Fire Ins. Co.* 7 Wend. 31; *Albert v. Savings Bank*, 2 Md. 160; *Tome v. Parkersburg Branch R. R. Co.* 39 Md. 36; 17 Am. Rep. 540; *Willis v. Philadelphia etc. R. R. Co.* 13 Phila. 33; S. C. 6 Week. N. Cas. 461; *People's Bank v. Kurtz*, 90 Pa. St. 344; 44 Am. Rep. 112; *Goodspeed v. East Haddam Bank*, 23 Conn. 530, 541; 58 Am. Dec. 239; *Bissell v. Michigan etc. R. R. Co.* 22 N. Y. 305; *Green v. London Omnibus Company*, 7 Com. B. (N. S.) 250; *Frankfort Bank v. Johnson*, 24 Mo. 490; *Philadelphia etc. R. R. Co. v. Ougly*, 21 How. (U. S.) 209; *Angell & Ames on Corporations*, § 302, 388, 391.

3 *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, 50.

4 *Ashby v. Blackwell*, 2 Eden, 299.

5 *Bissell v. Michigan etc. R. R. Co.* 22 N. Y. 258; *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30.

6 *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, 60. *Acc. Allen v. Addington*, 11 Wend. 374; *Thomas v. Winchester*, 6 N. Y. 387; 57 Am. Dec. 455; *Scott v. Shepherd*, 3 Wils. 403; *Gerhard v. Bates*, 2 El. & B. 489; S. C. 20 Eng. L. & Eq. 129; *Kortright v. Buffalo Commercial Bank*, 22 Wend. 368; S. C. 20 Wend. 94. The case of *Mechanics' Bank*, 3 Kern. 599, against the plaintiffs in the case of *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, was not decided "upon the ground that the plaintiffs were not in privity of dealing with the defendants by reason of the non-negotiable character of the certificates, and therefore could not sue for fraud." *Farmers & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 151; 69 Am. Dec. 678.

7 *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, 52, 53.

§ 274. Liability of corporation for an overissue by an agent acting without authority from directors.—It is no defense that the wrongful issue was made by an agent of the company, for a corporation cannot act except through its agents.¹ There can be no doubt that if the agents employed conduct themselves fraudulently, so that, if they had been acting for private employers, the persons for whom they were acting would have been affected by their fraud, the same principles must prevail

where the principal under whom the agent acts is a corporation.² But a corporation whose agents have issued spurious stock is not answerable in any event, but only where the directors of the corporation have either authorized, or by their negligence allowed, the fraud to be perpetrated.³ While it is a general rule that a person contracting with the officers and agents of a corporation must take notice of limitations of their authority,⁴ "yet if the directors of a company, no matter whether through inattention or otherwise, suffer its subordinate officers to pursue a particular line of conduct for a considerable period without objection, they are as much bound to those who are not aware of any want of authority, as if the requisite power had been directly conferred."⁵ The law, in behalf of innocent parties, and to prevent injustice, will imply authority in the agent to do the acts that have occasioned the injury, on the principle of *estoppel in pais*.⁶ So that, where a corporate agent is clothed with authority, either by direct appointment or by recognition and ratification, or by actual enjoyment of the fruits of his acts, or by long acquiescence therein from which a presumption of implied agency arises, the issuing of the certificates by him must be held to be within the scope of the real and apparent authority which he possesses; and the remedy of the shareholders is not prejudiced by the fact that the agent used, and intended to use, the avails for his own purpose.⁷ In short, the remedy is precisely the same as if the board of directors had issued the same certificates in fraud of their powers under the law, and obtained the shareholders' money thereon.⁸

1 *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, 50.

2 *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, 50, 51; quoting *Ld. Ch. CRANWORTH* in *Ranger v. Great Western R'y Co.* 5 H. L. Cas. 86, 87; *Tome v. Parkersburgh Branch R. R. Co.* 30 Md. 36; 17 Am. Rep. 540; *Thayer v. Barlow*, 19 Pick. 511; *Chestnut Hill etc. Co. v. Rutter*, 4 Serg. & R. 16; 8 Am. Dec. 675; *Life & Fire Ins. Co. v. Mechanics' Fire Ins. Co.* 7 Wend. 31; *Frankfort Bank v. Johnson*, 21 Me. 490; *Story on Agency*, § 308; *Angel & Ames on Corporations*, §§ 382, 388.

3 *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30. See, however, the earlier cases of *Mechanics' Bank v. N. Y. etc. R. R. Co.* 3 Kern. 599, and *New York etc. R. R. Co. v. Schuyler*, 38 Barb. 534.

4 *Smith v. Co-operative Dress Assoc.* 12 Daly, 304.

5 *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, 53, quoting *Beers v. Phoenix Glass Co.* 14 Barb. 360.

6 *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, 53, distinguishing *Mechanics' Bank v. New York etc. R. R. Co.* 3 Kern. 599.

7 *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, 64; *Bradley v. Richardson*, 2 Blatchf. 343; 8 C. 23 Vt. 720; *Tome v. Parkersburgh Branch R. R. Co.* 30 Md. 33, 87; 17 Am. Rep. 540; *Angel & Ames on Corporations*, 216; *Story on Agency*, § 54. *Cf. Hannibal Bank v. North Missouri Coal Co.* 13 Mo. 125, where it was held that a corporation will be presumed to have authorized its officers to issue its promissory note, from its having acquiesced in or recognized their acts in the regular course of its authorized business.

8 *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, 64.

§ 275. The same subject, continued.—And again, if an agent authorized by the terms of his appointment to enter into a series of engagements on behalf of his principal, and while the appointment is in force he fraudulently makes one in his own or a stranger's behalf, but in the form contemplated by the power, asserting it to be in the business of his employer by using his name to the contract, the person with whom he is dealing may rely upon that assertion, and is not bound to inquire nor to ascertain at his peril whether the transaction is not only in appearance but in fact within his authority;¹ “for seeing somebody must be loser by this deceit, it is more reasonable that he that employs and puts trust and confidence in the deceiver should be the loser than a stranger.”² These cases depend upon principles of the law of agency, not upon the nego-

liable nature of the certificates, except as it touches the question of privity of contract.³

1 *North River Bank v. Aymer*, 3 Hill, 262; reversed in *Mechanics' Bank v. New York etc. R. R. Co.* 3 Kern. 599, but declared to be sound law in *Farmers' & Mechanics' Bank v. Butchers' & Drovers Bank*, 16 N. Y. 142; 69 Am. Dec. 678; and in *Griswold v. Haven*, 25 N. Y. 601; 82 Am. Dec. 380; and in *Exchange Bank v. Monteath*, 26 N. Y. 505; and in *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, 61, where it is said, "if ever a case uncrowned by reversal, was lifted to its feet and restored to authority by adjudication, the *North River Bank v. Aymer* has been": *Tome v. Parkersburg Branch R. R. Co.* 39 Md. 36; 17 Am. Rep. 540.

2 Lord Holt's aphorism in *Hern v. Nichols*, 1 Salk. 289, quoted in this connection by DAVIS, J., in *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, 69, 70.

3 *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, 72.

§ 276. **The liability of corporate officers—civil and criminal.**—Officers of the corporation knowingly making an overissue of stock are personally liable to the shareholder, whether original taker or *bona-fide* transferee, for damages in an action for deceit;¹ or, it has been said, upon the ground of breach of warranty.² The General Railroad Act of New York, after providing for the manner of increasing the capital stock of railway companies organized under that act, and prohibiting any increase except as therein prescribed, proceeds to declare that any officer or director violating its provisions shall be guilty of a misdemeanor punishable by imprisonment not less than six months, and by a fine not exceeding one thousand dollars.³ And under the penal code of New York an officer, agent or other person employed by any corporation, who willfully and with design to defraud sells, pledges or issues, or causes to be sold, pledged or issued, or for those purposes signs or procures to be signed a false instrument purporting to be a scrip, certificate or other evidence of the ownership or transfer of

any share in the company, or bond or other evidence of debt of the company, is declared guilty of forgery in the third degree, and may be punished not only with the usual penalties for that offense, but also by a fine not exceeding three thousand dollars.⁴

1 *Seizer v. Mali*, 41 N. Y. 619; reversing S. C. 32 Barb. 76; *Bruff v. Mali*, 36 N. Y. 240; *Cazeaux v. Mali*, 25 Barb. 578; *Shotwell v. Mali*, 33 Barb. 445; *National Exchange Bank v. Sibley*, 71 Ga. 726; *Whitehaven etc. Co. v. Reed*, 44 Law T. R. 360.

2 Thus it has been held that a contractor with whom the directors have agreed to issue debenture stock, and to whom it was issued, but in excess of the amount which the company had authority to issue, may hold the directors liable in damages on the ground of breach of warranty: *Firbank v. Humphreys*, 18 Q. B. Div. 54.

3 N. Y. Laws of 1850, ch. 140, § 12, as amended by N. Y. Laws of 1880, ch. 133.

4 N. Y. Penal Code, § 518.

§ 277. The holder of overissued stock not liable thereon.—A subscription to overissued stock cannot be enforced either by the corporation or by its creditors, although the subscriber may have known at the time of making it that his subscription was in excess of the capital stock of the company;¹ neither will the subscriber be estopped by such knowledge from recovering money paid by way of an installment on his subscription.² For it follows that if the holder of overissued stock has none of the rights of a holder of genuine stock, he can be subjected to none of his liabilities.³ The holder of such stock is not estopped to set up its nullity by having attended by proxy the meetings at which it was voted to issue it; nor by having received certificates for the stock thus voted for; nor by the fact that after the unauthorized issue the company by its agents held itself out as possessing a capital equal to the amount represented both by its genuine and its spurious certificates,

and obtained credit on the faith of these representations.⁴

1 *Supra*, § 92; *Scoville v. Thayer*, 105 U. S. 143; *Clark v. Turner*, 73 Ga. 1. And a note, the consideration stated therein being shares of the capital stock, is held to be non-collectable where there has been an overissue of stock; for that it cannot be shown but that the shares delivered to the purchaser were of those illegally issued: *Merrill v. Beaver*, 50 Iowa, 404; S. C. 46 Iowa, 646; *Merrill v. Gamble*, 46 Iowa, 615.

2 *Knowlton v. Congress etc. Co.* 103 U. S. 49, affirming S. C. 14 Blatchf. 364; *Thomas v. City of Richmond*, 12 Wall. 349, 355; *Whelpley v. Erie R'y Co.* 66 Blatchf. 271; *Nellis v. Carke*, 4 Hill (N. Y.), 424; *Morgan v. Groff*, 4 Barb. 524; *Reed v. Boston Machine Co.* 141 Mass. 454; *White v. Franklin Bank*, 22 Pick. 181; *Hastelow v. Jackson*, 8 Barn. & C. 221; *Walker v. Chapman*, Lofft, 342; *Tappenden v. Randall*, 2 Bos. & P. 467; *Aubert v. Walsh*, 4 Taunt. 233; *Busk v. Walsh*, 4 Taunt. 230; *Lowry v. Bourdieu*, Doug. 468; *Bone v. Ekless*, 5 Hurl. & N. 925.

3 *Scoville v. Thayer*, 105 U. S. 143.

4 *Scoville v. Thayer*, 105 U. S. 143.

§ 278. The same subject continued—Distinction between an overissue and an irregular increase of stock.—It was agreed, in the leading case on this subject,¹ that a stockholder cannot set up informalities in the issue of stock as against the claims of corporate creditors.² But the court, while recognizing the rule in cases where authority had been granted by the legislature to increase the capital stock and the irregularity consisted merely in a failure to comply with the provisions of the enabling act, clearly distinguished these cases from those in which the issue had been made entirely without statutory authority.³ For persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. If their representations as to the amount of the capital stock were unauthorized, the public had no right to trust them, and the holders of the spurious certificates cannot be thereby estopped.⁴ The public

is bound to know that the law permitted no such increase of the capital stock as the company had attempted to make, and that any representation that it had been made was false.⁵

1 *Scoville v. Thayer*, 105 U. S. 143.

2 On the authority of *Pullman v. Upton*, 96 U. S. 328; *Chubb v. Upton*, 95 U. S. 685; *Upton v. Tribilcock*, 91 U. S. 45.

3 *Scoville v. Thayer*, 105 U. S. 143, citing 2 *Lindley on Partnership*, 138; *Lathrop v. Kneeland*, 46 Barb. 432; *Mackley's Case*, Law R. 1 Ch. 247; and reviewing *Stace's Case*, Law R. 4 Ch. 682, where the VICE-CHANCELLOR declared: "This was a void agreement, with a void acting upon it, a void recognition, and a void ratification by the acts which have been mentioned. It comes to an aggregate of nothings, and that aggregate of nothings is all there is to fix those gentlemen on the list of stockholders."

4 *Scoville v. Thayer*, 105 U. S. 143. Cf. *Smith v. Co-operative Dress Association*, 12 Daly, 304.

5 *Scoville v. Thayer*, 105 U. S. 143. Acc. *Zabriskie v. Cleveland etc. R. Co.* 33 How. 381, where the court, while holding a company liable on bonds indorsed by the directors without authority, added: "This principle does not impugn the doctrine . . . that persons dealing with a company must take notice of whatever is contained in the law of its organization."

§ 279. The remedy of the stockholders and of the corporation with respect to overissued stock. The transfer of overissued stock, or the voting of its holders at corporate meetings, or the payment of dividends upon it, may be restrained by injunction.¹ To this end and to finally adjust the rights of all parties, a bill may be filed either by the stockholders in their own behalf,² or by the corporation itself, as in the great case of the *New York and New Haven Railroad Co. v. Schuyler*.³ But long continued acquiescence on the part of the stockholders will bar their remedy.⁴ Although the initiative step in the proceedings may have been taken by the corporation against the holders of overissued stock, praying its cancellation, a court of equity, having granted the relief sought by the plaintiff, will not stop there, but will proceed in the

same case to grant the defendants damages against the plaintiff for the fraud practiced upon them by the corporate agents.⁵

1 *Thomas v. Railroad Co.* 101 U. S. 71; *Kent v. Quicksilver Mining Co.* 78 N. Y. 139; *Sherman v. Clark*, 4 Nev. 138; 97 Am. Dec. 516.

2 *Dewing v. Perdicaries*, 96 U. S. 193; *Woods v. Union etc. Assoc.* 63 Wis. 9.

3 17 N. Y. 592; S. C. 34 N. Y. 30, per DAVIS, J. See also, *Plimpton v. Bigelow*, 93 N. Y. 592, 602; *Venice v. Woodruff*, 62 N. Y. 462; 20 Am. Rep. 495; *Leigh Valley R. R. Co. v. McFarland*, 31 N. J. Eq. 730.

4 *Taylor v. South & North Alabama R. R. Co.* 4 Woods, 575. In this case the acquiescence was for ten years.

5 *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30.

§ 280. Remedy of the holder of overissued stock. The holder of overissued stock may bring his action for damages against the corporation and its officers, jointly or against either separately.¹ But if a separate action be instituted against the directors, the corporation should be joined as a party.² The plaintiff having proven in an action against the corporate officers that the whole capital stock had been issued prior to the date of the certificates held by him, the burden of proof devolves upon the defendants to show that the issue was made upon the surrender of legally issued certificates or upon the transfer of genuine stock.³ It is said, however, that a condition precedent to maintaining such an action for damages, is that the holder of the overissued stock shall discharge any lien upon it which would have properly attached to genuine stock under like circumstances.⁴ A holder both of valid and spurious stock cannot offset his claim against the corporation upon the latter as against its claim against him for assessments upon the former, when the corporation has become insolvent;⁵ according to the general rule whereby all debts owing the corpora-

tion on unpaid subscriptions are considered a trust fund devoted to the payment of all the creditors of the company, which upon the insolvency of the corporation equitably vests in all its creditors, to be equally divided among them *pro rata*.⁶ The transferee of overissued or spurious stock may hold his vendor liable if the latter has been guilty of fraud;⁷ but a vendor of spurious stock, not cognizant of the fraud, cannot be held liable by his vendee.⁸

1 *Bruff v. Mall*, 36 N. Y. 200.

2 *Henderson v. Railroad Co.* 17 Tex. 560; 67 Am. Dec. 675; *State v. Jefferson etc. Co.* 3 Humph. 305; *Ashmead v. Colby*, 26 Conn. 287; *Waldo v. Chicago etc. R. R. Co.* 14 Wis. 575; *Cargill v. Bower*, 10 Ch. Div. 502; *Venezuela R'y Co. v. Kisch*, Law R. 2 H. L. 99; *Henderson v. Lacon*, Law R. 5 Eq. 249; *Smith v. Reese*, Law R. 2 Eq. 264; *Askew's Case*, Law R. 9 Ch. 664; *Ross v. Estates etc. Co.* Law R. 3 Ch. 682; *Thorpe v. Hughes*, 3 Mylne & C. 742.

3 *Shotwell v. Mari*, 38 Barb. 445; *Bruff v. Mall*, 36 N. Y. 200.

4 *Mt. Holly Paper Co's Appeal*, 99 Pa. St. 513; *Cook on Stock & Stockh.* § 293, note 4.

5 *Scoville v. Thayer*, 105 U. S. 143.

6 *County of Morgan v. Allen*, 103 U. S. 498; *Scammon v. Kimball*, 92 U. S. 362; *Upton v. Sawyer*, 91 U. S. 56; *Sawyer v. Hoag*, 17 Wall. 613.

7 *Kendall v. Stone*, 5 N. Y. 14; *Kempson v. Saunders*, 4 Bing. 5; *Gompertz v. Bartlett*, 2 El. & B. 849; *Nockles v. Crosby*, 3 Barn. & C. 814.

8 *Seiger v. Mall*, 41 N. Y. 619; *State v. North Louisiana etc. R. R. Co.* 34 La. An. 947; *People's Bank v. Kurtz*, 99 Pa. St. 344; 44 Am. Rep. 112.

§ 281. **The measure of damages.**—In an action against a corporation growing out of an overissue of stock, the measure of damages is the amount which the plaintiff paid for the stock, together with interest thereon, “if the jury deem it proper to allow interest.”¹ The depreciation of the value of the stock in the market at the time the money was paid is not to be taken into consideration; nor, if the value of the stock should exceed the amount paid therefor with interest, can the plaintiff recover in any event more than that sum with interest.² In an action against the directors for an overissue

of stock, the measure of damages would seem to be the value of the stock, less, possibly, the amount which the allottees can recover from the company.³ In an action against the vendor of overissued stock which the company refused to register in the name of the vendee upon its transfer books, it was held that the measure of damages was the market value of the stock at the time the transfer was demanded.⁴

1 *Tome v. Parkersburg Branch R. R. Co* 39 Md. 36, 87; 17 Am. Rep. 540. In this case the treasurer had hypothecated two of the spurious certificates with the plaintiff, and had issued others to him directly.

2 *Tome v. Parkersburg Branch R. R. Co.* 39 Md. 36, 87; 17 Am. Rep. 540

3 *Firbank v. Humphreys*, 18 Q. B. 54.

4 *People's Bank v. Kurtz*, 99 Pa. St. 344, 349; 44 Am. Rep. 112. *Cf.* *Willis v. Philadelphia etc. R. R. Co.* 13 Phila. 33; S. C. 6 W. N. C. 461.

§ 282. Remedial statutes with respect to over-issued stock.—Overissued or spurious stock may, however, it seems, be legalized by a subsequent legislative grant of authority to increase the capital stock of the corporation.¹ But an overissue of stock by a company incorporated by two States cannot be cured except by the legislative sanction of both of the States from which it derives its existence.²

1 *Sewell's Case*, Law R. 3 Ch. 131; *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, 53, 57; *Cook on Stock & Stockh.* 292.

2 *Fisk v. Rock Island etc. R. R. Co.* 53 Barb. 513; *O'Brien v. Rock Island R. R. Co.* 53 Barb. 568.

CHAPTER XII.

DIVIDENDS.

- § 283. Definitions—The four kinds of dividends.
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§ 312. The same subject continued—Whether demand is requisite—Interest.

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§ 314. Recovery of dividends illegally paid.

§ 283. Definitions—The four kinds of dividends.

A dividend is a corporate profit set aside, declared, and ordered by the proper corporate authorities to be paid to the stockholders on demand or at a fixed time.¹ Dividends are of four kinds. The first and most usual is the cash dividend; and in the absence of special provision to the contrary, a dividend is presumed to be payable in cash and in lawful or in current money.² Another kind of dividend is payable in property; but while a dividend of this nature is recognized as legal,³ it is unusual, and but few cases are to be found in which it is discussed. The scrip dividend is simply a certificate issued by the corporation to its shareholders, conferring upon them the privilege of deriving a pecuniary benefit from the assets of the company at some future time.⁴ Under certain circumstances a corporation may, in lieu of a dividend in money or property, issue additional stock to its members; but in some of the States, stock dividends are prohibited by statute.⁵

1 Cook on Stock & Stockh. § 534.

2 See Cook on Stock & Stockh. § 535, and cases cited *infra*, § 286.

3 *Scott v. Central R. R. Co. of Georgia*, 52 Barb. 45.

4 *Infra*, § 284, and cases there cited.

5 *Infra*, § 286.

§ 284. Scrip dividends.—Upon an examination of the affairs of a company at the end of a fiscal period, it may be found that after the current lia-

bilities have been met and certain assets have become available, there will remain a net profit from which dividends may be properly declared; yet it sometimes happens that there are no funds on hand from which payment may be made. It is in such a case that a dividend of scrip may be properly issued. This scrip is a certificate reciting that its holder is entitled to a certain sum of money with interest thereon in settlement of dividends upon the stock of the company, or to a certain number of shares of stock, or that its holder may exchange it for any bonds and securities of the company, as the case may be.¹ The rights of the holders of scrip dividends are measured by the contract under which the scrip is issued, of which the scrip alone is evidence.² Thus, where the contract incorporated in scrip, issued as a dividend, is merely an engagement that the holders "will be entitled" to receive stock in exchange therefor after the payment of the funded debt of the company, or after provision shall be made for its payment, the scrip-holders are not entitled to dividends upon the scrip nor to participate in those declared before the conversion of the scrip into stock.³ And where a certificate recited that it entitled its holder to a certain sum of money, with interest from date, in settlement of dividends on the preferred guarantied stock of the company, which was to be paid whenever the company from its earnings should have extinguished its floating debt, and have a sufficient sum to pay the dividend of which this scrip was a part, the certificate being exchangeable into bonds of the company, it was held that it was not payable absolutely and unconditionally, as interest is,

but only out of profits made by the company, the preference being limited to profits whenever earned.⁴

1 For examples of the form of these scrip certificates see *Chaffee v. Rutland etc. R. R. Co.* 55 Vt. 110, 112; *Brown v. Lehigh Coal etc. Co.* 49 Pa. St. 270; *State v. Baltimore etc. Co.* 6 Gill, 333; *Bailey v. Citizens' Gas-light Co.* 27 N. J. Eq. 196.

2 *Brown v. Lehigh etc. Co.* 49 Pa. St. 270.

3 *Brown v. Lehigh etc. Co.* 49 Pa. St. 270.

4 *Chaffee v. Rutland R. R. Co.* 55 Vt. 110, 126. *Acc. St. John v. Erie R. R. Co.* 10 Blatchf. 271; S. C. 22 Wall. 133; *Lockhart v. Van Alstyne*, 31 Mich. 76; 18 Am. Rep. 156; *McGregor v. Insurance Co.* 6 Stewt. Eq. 131; *Taft v. Railroad Co.* 8 R. L. 310; *Corry v. Railroad Co.* 29 Beav. 263; *Jones on Railroad Securities*, § 620; *Field on Corporations*, § 121.

§ 285. **Stock dividends—The general rule.** When a corporation has not issued stock to the full amount authorized by its charter, or when it has been empowered by statute to increase its capital stock, it may invest the profits of the enterprise in improvements and extension of the business, and in lieu of a cash dividend, issue to its members additional shares of stock.¹ Such an issue is termed a stock dividend, and provided it be based upon an equal addition to the capital of the company, or increase in the value of the corporate property, its validity is well established,² unless forbidden by some constitutional or statutory provision, as in Illinois,³ Wisconsin,⁴ and Massachusetts.⁵ And in Alabama under the provision of the State constitution prohibiting the issue of stock or bonds except for labor done, or money or property actually received,⁶ it is held that an increase in the value of the property in which the original stock is invested, will not warrant the issue of additional stock by way of stock dividends.⁷ Similar prohibitions of the issue of stock by any corpora-

tion, except for money, labor done, or money or property actually received, are contained in the constitutions of Pennsylvania, Missouri, Arkansas, Texas, California, Colorado, Alabama and Louisiana; and in Illinois and Nebraska like constitutional provisions exist with respect to railway companies. In all these States such a fictitious increase of stock is void, and in Louisiana the corporation will also forfeit its charter.⁸

1 *Howell v. Chicago etc. R. R. Co.* 51 Barb. 378; *Leland v. Hayden*, 102 Mass. 542; *Deland v. Williams*, 101 Mass. 571; *Boston etc. R. R. Co. v. Commonwealth*, 130 Mass. 399; *Minot v. Paine*, 99 Mass. 101; 96 Am. Dec. 705; *Atkins v. Albree*, 12 Allen, 359, and see cases cited *infra*, n. 2.

2 *Williams v. Western Union Tel. Co.* 93 N. Y. 162, 188; *Howell v. Chicago etc. R. R. Co.* 51 Barb. 378, *Clarkson v. Clarkson*, 18 Barb. 646; *Gordon v. Richmond etc. R. R. Co.* 78 Va. 501; *Howell v. Chicago etc. R. R. Co.* 51 Barb. 378; *Miller v. Illinois Central R. R. Co.* 25 Barb. 312; *State v. Baltimore etc. R. R. Co.* 6 Gill, 363; *Commonwealth v. Pittsburgh etc. R. R. Co.* 74 Pa. St. 83; *Rand v. Hubbell*, 115 Mass. 461, 474; 15 Am. Rep. 121; *Boston etc. R. R. Co. v. Commonwealth*, 106 Mass. 399; *City of Ohio v. Cleveland etc. R. R. Co.* 6 Ohio St. 489; *Barton's Trust*, Law R. 5 Eq. 239. But see *Hoolo v. Great Western R'y Co.* Law R. 3 Ch. 262.

3 Ill. Const. art. 11, § 13.

4 Wis. Rev. Stat. (1878) § 1753, amended by Laws of 1881, ch. 93.

5 Except under authority of court: Mass. Pub. Stat. ch. 112, § 61. This act, how ever, is held not to prohibit a company from purchasing its own shares and distributing them among its stockholders: *Commonwealth v. Boston etc. R. R. Co.* 25 Am. & Eng. R'y Cas. 17.

6 Ala. Const. art. 13, § 6.

7 *Fitzpatrick v. Dispatch etc. Co.* (1887) 83 Ala. 604.

8 *Stinson's Am. Stat. Law* (Jan., 1886), § 452.

§ 286. **Stock dividends**—To be declared by stockholders—Sundry considerations.—The power of a corporation to increase its capital stock being generally vested in its shareholders, it is usually with them that the power to declare a dividend of stock resides.¹ A vote of the shareholders declaring a stock dividend may be revoked at any time before the certificates have been issued.² The holders of preferred stock are entitled to share equally with common stockholders in a distribution of

stock by way of stock dividend.³ A stock dividend may be issued to the corporation instead of to its shareholders, and be subsequently sold for its benefit.⁴ In case of an issue of new stock in lieu of a dividend, it has been held that the company may give its shareholders "the privilege of taking it at par or less than par, although the stock so issued is worth more than par."⁵ Where sums chargeable to capital account were paid out of revenue, it was held on the construction of the special acts relative to the company, that shares which the directors had power to issue, but which could only have been sold at a discount, could not be issued at par in lieu of the dividend which might have been paid if the revenue had not been diverted.⁶ A State court will not inquire into the legality of an issue of stock dividends by a foreign corporation.⁷

1 *Williams v. Western Union Tel. Co.* 93 N. Y. 162; *Terry v. Eagle etc. Co.* 47 Conn. 141.

2 *Terry v. Eagle etc. Co.* 47 Conn. 141.

3 *Gordon v. Richmond etc. R. R. Co.* 78 Va. 501; *Phillips v. Eastern R. R. Co.* 138 Mass. 122.

4 *Cook on Stock & Stockh.* § 537, citing *Jones v. Morrison*, 31 Minn. 140.

5 *Wood's Railway Law*, § 72, citing *Moss's Appeal*, 83 Pa. St. 265; *Wiltbank's Appeal*, 64 Pa. St. 256.

6 *Hook v. Great Western R'y Co.* Law R. 3 Ch. 262.

7 *Howell v. Chicago etc. R. R. Co.* 51 Barb. 378.

§ 287. Dividends upon preferred stock.—The holders of preferred or guarantied stock do not occupy the position of creditors of the company with respect to the payment of dividends.¹ They are entitled to dividends only out of the net profits of the enterprise;² for a guaranty of dividends upon stock is always accompanied by the condition, either expressed or implied, that they should be paid

only from the earnings of the enterprise. A contract to pay at all events, would be *ultra vires* and wholly void.³ Where the company has contracted to pay dividends upon stock at certain intervals, the shares, with respect to which the agreement was made, partake of the nature of preferred stock; and like other holders of preferred shares, their owner cannot enforce the payment of dividends except out of the net profits of the enterprise.⁴ In the case of guarantied and preferred stock the holders are entitled to dividends before a payment of dividends to the holders of the common stock;⁵ and equity will restrain the payment of dividends upon common stock until the holders of guarantied or preferred stock have been paid;⁶ neither are earnings to be devoted to payment of a floating debt in preference to the payment of dividend upon preferred stock;⁷ nor, after payment of current expenses and interest upon its bonded indebtedness, can a company, in lieu of paying the remaining net earnings as a dividend to preferred shareholders, set it apart to provide a sinking fund for the payment of its bonded debt.⁸

1 *Vide supra*, § 67.

2 *Vide supra*, § 65; *Chaffee v. Rutland R. R. Co.* 55 Vt. 110, 126; *Pierce on Railroads*, 125. *Cf.* § 64, *supra*.

3 *Curran v. State*, 15 How. 304; *Taft v. Hartford etc. R. R. Co.* 8 R. I. 335; 5 Am. Rep. 575; *Williston v. Michigan Southern*, 13 Allen, 400; *Pittsburg etc. R. R. Co. v. Alleghany Co.* 63 Pa. St. 126; *Lockhart v. Van Alstyne*, 31 Mich. 76; 18 Am. Rep. 156; *Evansville etc. R. R. Co. v. Evansville*, 15 Ind. 395; *In re Bristol etc. R'y Co.* Law R. 6 Eq. 484.

4 *Scott v. Central R. R. etc. Co. of Georgia*, 52 Barb. 45.

5 *Thompson v. Erie R. R. Co.* 11 Abb. Pr. N. S. 188.

6 *Prouty v. Michigan Southern etc. R. R. Co.* 1 Hun, 655.

7 *National Bank v. Douglass*, 1 McCrary, 86; *Railroad Co. v. Howard*, 7 Wall. 392; *Chaffee v. Rutland etc. R. R. Co.* 55 Vt. 110; *In re London Rubber Co.* Law R. 5 Eq. 525; *Jones on Railroad Securities*, § 620.

8 *Hazeltine v. Belfast etc. R. R. Co.* (1887), 79 Me. 411; where it was held, also, that in such a case a court of equity would compel the payment of dividends.

§ 288. Dividends upon preferred stock.—The discretion of the directors subject to review in equity.—While the directors have a discretion with respect to declaring dividends upon ordinary stock,¹ they have none with respect to preferred stock when there are funds on hand from which a dividend thereon may be properly declared, and a court of equity will compel them to declare it;² except when, by so doing, an injustice would be wrought upon corporate creditors and the other stockholders by taking money from the treasury without which the enterprise would be crippled.³ Although preferred shareholders cannot maintain an action at law to enforce the payment of dividends which have not been declared,⁴ equity may, in a proper case, decree a specific performance;⁵ and, in general, a court of equity will, by injunction and other proper remedies, protect the rights of the holders of preferred stock.⁶

1 *Id.* *infra*, § 298.

2 *Hazeltine v. Belfast etc. R. R. Co.* (1887) 79 Me. 411; *St. John v. Erie R'y Co.* 23 Wall. 136; *Bailey v. Railroad Co.* 17 Wall. 96; *Prouby v. Lake Shore etc. R. R. Co.* 82 N. Y. 53; *Thompson v. Erie R'y Co.* 45 N. Y. 468; *Chase v. Vanderbilt*, 37 N. Y. Supr. Ct. 334; *Dickinson v. Railroad Co.* 7 W. Va. 390; *Wulston v. Massachusetts R. R. Co.* 95 Mass. 400; *Harvard v. Vermont etc. R. R. Co.* 50 Mass. 512; *Davis v. Proprietor etc.* 49 Mass. 321; *Taft v. Hartford etc. R. R. Co.* 8 R. I. 310 8 Am. Rep. 575; *Polfest etc. R. R. Co. v. Belfast*, 77 Me. 415; *Bates v. Androscoggin etc. R. R. Co.* 49 Me. 491; *Richardson v. Vermont etc. R. R. Co.* 41 Vt. 613; *Rutland etc. R. R. Co. v. Thwait*, 3 Vt. 50; *West Chester etc. R. R. Co. v. Jackson*, 77 Pa. St. 321; *Bryant v. Ohio etc. R. R. Co.* 14 O. Rep. 67.

3 *Culver v. Reno etc. Co.* 91 Pa. St. 367, *Cook v. Book & Stockh.* § 371.

4 *Wulston v. Michigan etc. R. R. Co.* 95 Mass. 400.

5 *Boardman v. Lake Shore etc. P. R. Co.* 84 N. Y. 137.

6 *Bailey v. Hannibal etc. R. R. Co.* 1 D. 1174 Etaw. rth. New York etc. R. R. Co. 98 N. Y. 648; *Boardman v. L. & N. Sh. etc. R. R. Co.* 84 N. Y. 137; *Thompson v. Erie R'y Co.* 45 N. Y. 408; *Prouby v. M. & E. R. R. Co.* 1 Hun. 655; *Henry v. Great Northern etc. Ry. Co.* 4 Kay & 104; 8 O. 1; *De Gex & J.* 606; *Sturge v. Eastern etc. Ry. Co.* 7 De G. & M. 50; *G. 159*; *Smith v. Cork etc. R'y Co. Jr.* R. 3 Eq. 350. Cf. *Chase v. Vanderbilt*, 37 N. Y. 307.

§ 289. **Of arrears of dividends upon preferred stock—The American and the English common-law rule.**—A holder of preferred or guarantied stock is not deprived of his right to dividends, because the earnings out of which they were expected to be made were not realized during the year in which, by the terms of the contract, they ought to have been paid. On the contrary, the unpaid dividends remain a charge upon all subsequently accruing profits, and must be paid before anything can be divided among the common stockholders. This is substantially interest, chargeable exclusively upon profits.¹ A court of equity will, by injunction, restrain the misappropriation of the dividends to the common stock, until the arrears, with interest, on the guarantied stock shall be paid out of the net earnings of the company.² But where there is a statutory provision that dividends on preferred stock shall *not exceed* a certain percentage, and less than that percentage is paid, the deficit cannot be claimed out of the profits of subsequent years.³ So where a similar provision was made by a by-law declaring that "dividends on the preferred stock shall first be made semi-annually from the net earnings of the road, not exceeding six per centum per annum, after which dividend, if there shall remain a surplus, a dividend shall be made upon the non-preferred stock up to a like per centum per annum, and should a surplus then remain of net earnings after both of said dividends, in any one year, the same shall be divided *pro rata* upon all the stock," it was held to form part of the contract of the company with subscribers to the preferred stock, and hence that holders thereof were entitled to a dividend in each

year in which there were any net earnings; but that the dividends upon the preferred stock were not cumulative, it appearing by the by-laws to be the intention that all the net earnings be paid in dividends in each year.⁴ If provision has been made for the payment of a dividend to the holders of the common stock after the payment of the preferred dividend, it is held that arrears of common dividends must be paid next after the arrears of preferred dividends, and before any further preferred dividends can be declared.⁵ When arrears of dividends are recoverable, the shareholder is entitled to interest also thereon.⁶

1 *Boardman v. Lake Shore Co. etc. R. R. Co.* 84 N. Y. 187; *Adams v. Fort Plain Bank*, 36 N. Y. 225; *Dana v. Fiedler*, 13 N. Y. 40, 63 Am. Dec. 130; *Prossy v. Michigan etc. R. R. Co.* 1 H. 10, 625; *Taft v. Hartford etc. R. R. Co.* 8 H. L. 310; 5 Am. Rep. 575; *Elkins v. Camden etc. R. R. Co.* 36 N. J. Eq. 223; *Lockhart v. Van Alstyne* 31 Mich. 76, 18 Am. Rep. 156; *Heary v. Great Northern Ry. Co.* 1 De Gex & J. 606, 687; 8 C. 3 Jur. N. B. 1133; 8 C. 4 Kay & J. 1; *Sturge v. Eastern etc. Ry. Co.* 7 De Gex, M. & L. 158; *Matthews v. Great Northern Ry. Co.* 36 Law J. Ch. 375; *Crawford v. North Eastern Ry. Co.* 3 Jur. N. B. 1093; *Stevens v. South Devon Ry. Co.* 9 Hare, 313; *Oney v. Belfast etc. Ry. Co.* 1 R. 2 C. L. 112; *Smith v. Cork etc. Ry. Co.* 1r Law 3 Eq. 353; *Conter v. Nottingham etc. Ry. Co.* 30 Beav. 86; *Webb v. Earle*, Law R. 30 Eq. 556; *Corry v. Londonderry etc. Ry. Co.* 29 Beav. 263; *Lindley on Partnership* (2nd ed.), 781. *Contra, Belfast etc. R. R. Co. v. Belfast*, 77 Ma. 445.

2 *Adams v. Fort Plain Bank*, 36 N. Y. 255; *Dana v. Fiedler*, 13 N. Y. 41; 63 Am. Dec. 130; *Prossy v. Michigan etc. R. R. Co.* 1 Hum. 605.

3 *Elkins v. Camden etc. R. R. Co.* 36 N. J. Eq. 223.

4 *Hazeltine v. Belfast etc. R. R. Co.* (1887), 79 Ma. 411; 1 Am. Rep. 328.

5 *Allen v. Londonderry etc. Ry. Co.* 26 Week. R. 594; *Cook on Stock & Stockh.* § 372.

6 *Boardman v. Lake Shore etc. R. R. Co.* 84 N. Y. 187.

§ 200. Of arrears of dividends upon preferred stock.—The English statute.—In England since the passage of the Companies' Clauses Act of 1863, if in any year "there are not profits available for the payment of the full amount of preferential dividend or interest for that year, no part of the

deficiency shall be made good out of the profits of any subsequent year, or out of any other funds of the company.”¹ But it has been held under that act, that preference shareholders who have allowed the surplus profits of one year to be applied in payment of dividends to ordinary shareholders, instead of in payment of dividends to them, are not prevented from claiming arrears against the profits of future years.² So, also, if the management has paid out, as dividends, for several years, money which should have been set aside for repairs, until the property was worn out, and then appropriated the whole net earnings of one year to repairs, paying the preferred shareholders nothing, it is held that the arrears for that year may be recovered out of the profits of any subsequent year.³

1 26 & 27 Vict. ch. 118, § 14.

2 *Matthews v. Great Northern R'y Co.* 20 Law J. Ch. 375; *Smith v. Cork etc. R'y Co.* Irish Law R. 3 Eq. 356.

3 *Dent v. London Tramways Co.* 16 Ch. Div. 344.

§ 291. **Dividends upon interest-bearing stock.** Interest-bearing stock, the nature of which has been treated above,¹ is entitled to interest only out of the profits of the business, and any contract to pay it whether there be profits or no is *ultra vires* and wholly void;² and the directors and officers of the company, in complying with such a contract, become jointly and severally liable to refund the amount of the dividend to the company;³ but an agreement to pay interest on fully paid stock until the railway shall be constructed and put in operation, is a valid contract.⁴

1 *Vide supra*, § 69.

2 *Troy etc. R. R. Co. v. Tibbits*, 18 Barb. 297; *Barnard v. Vermont etc. R. R. Co.* 89 Mass. 512; *Cunningham v. State*, 78 Mass. 411; *Waterman v.*

Troy etc. R. R. Co. 74 Mass. 433; Wright v. Vermont etc. R. R. Co. 66 Mass. 68; Richardson v. Vermont etc. R. R. Co. 44 Vt. 613; *Rutland R. R. Co. v. Thrall*, 35 Vt. 543; Pittsburgh etc. R. R. Co. v. Allegheny, 63 Pa. St. 126; Miller v. Pittsburgh etc. R. R. Co. 40 Pa. St. 257; 80 Am. Dec. 570; McLaughlin v. Detroit etc. R. R. Co. 8 Mich. 100; Evansville etc. R. R. Co. v. Evansville, 15 Ind. 395; Painesville etc. R. R. Co. v. King, 17 Ohio St. 534; *City of Ohio v. Cleveland etc. R. R. Co.* 6 Ohio St. 489; Lockhart v. Van Alstyne, 31 Mich. 76; 13 Am. Rep. 156; In re National etc. Co. 10 Ch. Div. 118; McDougall v. Jersey etc. Co. 2 H. & M. 528; Salisbury v. Metropolitan R'y Co. 38 Law J. Ch. N. S. 249. Cf. *Bardwell v. Snefield etc. Co.* Law R. 14 Eq. 517.

3 In re National etc. Co. 10 Ch. Div. 118.

4 *Rutland etc. R. R. Co. v. Thrall*, 35 Vt. 533; Miller v. Pittsburgh etc. R. R. Co. 40 Pa. St. 237; 80 Am. Dec. 570; *Racine County Bank v. Ayers*, 12 Wis. 512; Milwaukee etc. R. R. Co. v. Field, 12 Wis. 340.

§ 292. Dividends upon special stock.—The nature of special stock has been heretofore considered.¹ The guaranty of dividends upon special stock is an absolute one and in no wise conditional upon the profits of the enterprise.² Where there are no profits, the dividends upon special stock must be paid out of any property which is owned by the company, for the holders of stock of this kind are regarded as creditors of the corporation with respect to the guarantied dividends.³

1 Vide *supra*, § 68.

2 Williams v. Parker, 136 Mass. 204; Allen v. Herrick, 81 Mass. 274. See also Cook on Stock & Stockh. § 275.

3 Williams v. Parker, 136 Mass. 204.

§ 293. Discrimination between shareholders of the same class, illegal.—There are cases in which the corporate management has attempted in declaring dividends to discriminate between large and small shareholders;¹ or between shareholders whose subscriptions were fully paid, and those in arrears;² but it is well settled that such a discrimination is unlawful, and that the several holders of the same class of shares are entitled to share in equal proportion in any dividends declared thereon;³ and a court of

equity may restrain discrimination of this character.⁴ A preference between shareholders of the same class is not to be justified on the ground that the fund set apart for the payment of the dividend proved inadequate to pay all of the stockholders without infringing upon the capital stock of the company.⁵ A shareholder to whose stock a *pro rata* of the dividend has not been apportioned may maintain *assumpsit* against the corporation on the implied contract that the distribution of dividends shall be equally made;⁶ or he may maintain an action for damages against the company for paying dividends to shareholders ranking *pari passu* with himself and omitting to declare a dividend on his shares.⁷

1 Jones v. Terre Haute etc. R. R. Co. 57 N. Y. 196; State v. Baltimore, etc. R. R. Co. 6 Gill, 363.

2 Reese v. Bank, 34 Pa. St. 78; Oakbank Oil Co. v. Crun, Law R. 8 App. C. 65.

3 Jones v. Terre Haute etc. R. R. Co. 57 N. Y. 196; S. C. 29 Barb. 353; Howell v. Chicago etc. R. R. Co. 51 Barb. 378; State v. Baltimore etc. R. R. Co. 6 Gill, 363; Ryder v. Alton etc. R. R. Co. 13 Ill. 516; Coey v. Belfast etc. R'y Co. I. R. 2 C. L. 112; Harrison v. Mexican R'y Co. Law R. 19 Eq. 38. Cf. Miller v. Illinois Central R. R. Co. 24 Barb. 312.

4 Luling v. Atlantic Mutual Ins. Co. 45 Barb. 510. Cf. Harrison v. Mexican R'y Co. Law R. 19 Eq. 338.

5 Stoddard v. Shetucket Foundry Co. 34 Conn. 542; Beers v. Bridgeport Spring Co. 42 Conn. 17.

6 Jackson v. Newark Plankroad Co. 31 N. J. Law, 277. But see State v. Baltimore etc. R. R. Co. 6 Gill, 363, where it is held that the shareholder cannot maintain *assumpsit*, but must proceed by bill in equity.

7 Coey v. Belfast etc. R'y Co. I. R. 2 C. L. 112.

§ 294. The same subject continued—Remedy of the shareholder.—When a dividend has been declared and payment has been made to the other shareholders, the company cannot plead to an action by a shareholder who has not received his portion that the dividend was illegally declared, not having been earned, and that it cannot be paid without infringing upon the capital stock.¹ A shareholder

from whom a dividend has been illegally withheld, and who is unable to collect his judgment against the company, may resort to the other shareholders to recover, as for money had and received, the proportion of the dividends received by them to which he was entitled, and which he would have received, had his shares participated in the fund distributed; but he cannot maintain an action against them in the first instance.² Mere possession of the certificate of stock, or even a special property therein by a person not their owner, is not sufficient ground upon which to base an action for dividends.³ An unregistered transferee cannot enforce the payment of a dividend at law, but must bring his bill in equity.⁴ Each shareholder can only sue for himself; he cannot bring an action in behalf of the other stockholders.⁵ Proceedings to enforce the payment of dividends should as a general rule be instituted against the corporation itself, and not against its officers.⁶

1 Stoddard v. Shetucket etc. Co. 34 Conn. 542.

2 Leckham v. Van Wagenen, 83 N. Y. 40; 38 Am. Rep. 392.

3 Dow v. Gould etc. Mining Co. 31 Cal. 629.

4 Cleveland etc. R. R. Co. v. Robbins, 35 Ohio St. 483; Chambersburgh Insurance Co. v. Smith, 11 Pa. St. 120; Northrup v. Curtis, 5 Conn. 246.

5 Carlisle v. Southeastern R'y Co. 13 Beav. 295.

6 Smith v. Poor, 40 Me. 415; S. C. 3 Ware, 148; 63 Am. Dec. 672.

§ 295. **A dividend declared is a debt due absolutely and may be assigned.**—Until a dividend be declared, the stockholder has but a contingent interest in the surplus earnings of the company, and does not occupy the position of a creditor of the company.¹ But after it has been declared, it becomes a debt due absolutely to the shareholder.²

If a specific fund be deposited by the corporation in bank, or be otherwise set aside for the payment of a dividend, the shareholders acquire a lien thereon superior to the claims of corporate creditors, which in case of the insolvency of the company will follow the fund into the hands of a receiver.³ Such a specific deposit remains ordinarily at the risk of the company.⁴ But if a stockholder who has been duly notified that a dividend has been declared, does not call for his money within a reasonable time, and, in the meanwhile, the bank in which it was deposited fails, the stockholder and not the company will be the loser.⁵ If a dividend has been declared, but no specific fund has been set aside for payment thereof, upon the insolvency of the company shareholders can only share ratably with other corporate creditors.⁶ A claim by a shareholder against the company for his dividends is not of the nature of a claim by a *cestui que trust* against his trustee.⁷ A dividend being distinct and separable from the fund out of which it is declared, may be the subject of assignment by the shareholder, before he has received it from the company.⁸ Although bargains in prospective dividends are transactions which the stock exchange does not recognize nor enforce,⁹ they are not contrary to law, and are valid as between the parties.¹⁰ It has been said, however, that arrears of dividends on preferred stock, which have not been declared, cannot be assigned apart from the shares themselves.¹¹

1 Brundage v. Brundage, 60 N. Y. 544; Jones v. Terre Haute etc. R. R. Co. 57 N. Y. 156; Hyatt v. Allen, 56 N. Y. 553; 15 Am. Rep. 449; Gordon v. Richmond etc. R. R. Co. 18 Va. 501; Curry v. Woodward, 44 Ala. 35; Elkins v. Cammen etc. R. R. Co. 36 N. J. Eq. 233; Lockhardt v. Van Alstyne, 31 Mich. 77, 78; Rand v. Hubbell, 115 Mass. 461, 474; 15 Am. Rep. 121; Goodwin v. Hardy, 57 Me. 143, 145; 99 Am. Dec. 758; Dalton v. Malden Counties R'y Co. 13 Com. B. 474.

2 *Jermain v. Lake Shore etc. R. R. Co.* 91 N. Y. 483; *Van Dyck v. Mo-Quade*, 86 N. Y. 38; *Hill v. Newichawanick Co.* 71 N. Y. 593; S. C. 8 Hun, 459; *Brundage v. Brundage*, 60 N. Y. 514; S. C. 65 Barb. 397; *Scott v. Central R. R. etc. Co. of Georgia*, 52 Barb. 45; *Spear v. Hart*, 3 Robertson, 420; *In re Le Blanc*, 14 Hun, 8; *Beers v. Bridgeport Spring Co.* 42 Conn. 17; *Williston v. Michigan etc. R. R. Co.* 13 Allen, 404; *King v. Patterson etc. R. R. Co.* 29 N. J. 82, 504; *Harris v. San Francisco etc. Co.* 41 Cal. 393; *Hart v. St. Charles Street R'y Co.* 30 La. An. 758; 34 Am Rep. 532; *Fawcett v. Laurie*, 1 Drew. & S. 192. Cf. *Carlisle v. Southeastern R'y Co.* 1 Macn. & G. 689; *People v. Merchants' and Mechanics' Bank*, 78 N. Y. 269.

3 *In re Le Blanc*, 14 Hun, 8; *Le Roy v. Globe Insurance Co.* 2 Edw. Ch. 657; *Beers v. Bridgeport Spring Co.* 42 Conn. 17.

4 *King v. Patterson etc. R. R. Co.* 29 N. J. 82; 504.

5 *King v. Patterson etc. R. R. Co.* 29 N. J. 82.

6 *Lowne v. American Fire Insurance Co.* 6 Paige, 482.

7 *Smith v. Cook etc. R'y Co.* 1 R. 5 Eq. 65.

8 *Martin v. Gibbon*, 33 Law T. N. S. 561; *Cook on Stock & Stockh.* § 546. Cf. *Jermain v. Lake Shore etc. R. R. Co.* 91 N. Y. 483.

9 Eng. Stock Ex. Rules, No. 61.

10 *Martin v. Gibbon*, 33 Law T. N. S. 561; *Cook on Stock & Stockh.* § 545.

11 *Manning v. Quicksilver etc. Co.* 24 Hun, 361.

§ 296. Of the time, place and manner of paying dividends.—It is not requisite that the resolution declaring a dividend should appoint the time of payment. It may be subsequently fixed by the directors.¹ But a dividend must be made payable within a reasonable time after it is declared² and at a reasonable place.³ When a dividend is not declared as payable in a particular currency, it is deemed payable in lawful money.⁴ If a dividend is declared as payable in a certain currency, although the currency has depreciated or become entirely valueless, the shareholders cannot recover in any other.⁵

1 *Simpson v. Moore*, 30 Barb. 637; *Clarkson v. Clarkson*, 18 Barb. 646; *Spear v. Hart*, 3 Rob. 420; *Le Roy v. Globe Ins. Co.* 2 Edw. Ch. 657. *Foots*, Appellant, 22 Pick. 299; *Balch v. Hallett*, 10 Gray, 402; *March v. Eastern R. R. Co.* 43 N. H. 515; S. C. 40 N. H. 548; 77 Am. Dec. 732; *Earp's Appeal*, 28 Pa. St. 363; *Jackson v. Newark Plank Road Co.* 31 N. J. 277; *King v. Patterson etc. R. R. Co.* 29 N. J. 82, 504; *Van Doren v. Olden*, 19 N. J. 117; *De Gendre v. Kent*, Law R. 4 Eq. Cas. 283; *Price v. Anderson*, 15 Sim. 473; *McLaren v. Stainton*, 3 De Gex. F. & J. 202.

2 *Brundage v. Brundage*, 60 N. Y. 544; S. C. 65 Barb. 397; *City of Ohio v. Cleveland etc. R. R. Co.* 6 Ohio St. 489. *Cf.* *Burroughs v. North Carolina R. R. Co.* 67 N. C. 376; 12 Am. Rep. 611.

3 *King v. Patterson etc. R. R. Co.* 29 N. J. 82.

4 *Scott v. Central R. R. Co. of Georgia*, 52 Barb. 45.

5 *Ehle v. Chittenago Bank*, 21 N. Y. 548; *Scott v. Central R. R. etc. Co. of Georgia*, 52 Barb. 45. *Cf.* *Reed v. Eatonton etc. Co.* 40 Ga. 98.

§ 297. From what funds dividends may be paid—Of net profits.—No part of the capital stock of a corporation can be lawfully distributed among the shareholders by way of dividend, and any attempt to do so may be enjoined at the instance of a dissenting member;¹ or if actually paid, may be under certain circumstances recovered from the shareholders by the corporate creditors or by the directors.² For, in America, the capital stock of the corporation is deemed a trust fund for the payment of corporate debts, and is not, under any circumstances, to be impaired;³ and, in England, any reduction of the capital is *ultra vires*; and upon that ground a dividend, which has the effect of diminishing it, may be recovered from the stockholders.⁴ This is the rule at common law independent of statute, but in England the rule has been incorporated in the Companies' Clauses Act of 1845,⁵ by which it is provided that the company shall not make any dividend whereby their capital stock will be in any degree reduced; provided always, that the word "dividend" shall not be construed to apply to a return of any portion of the capital stock, with the consent of all the mortgagees and bond creditors of the company, due notice being given for that purpose at an extraordinary meeting to be convened for that object. When, however, the capital stock of a company has been reduced,

the property thus deducted from the capital may be distributed as a dividend.⁶ But money which has been paid upon shares which are forfeited cannot be treated as profits and be distributed as a dividend.⁷ And as a general rule a dividend can only be legally declared out of the *net profits* of the enterprise;⁸ and then only when the corporation is solvent. If it be insolvent, its surplus earnings should be reserved for the payment of corporate debts.⁹ It is not essential that a dividend declared in any year should be paid out of the net earnings of that same year. A dividend may be declared for a fiscal year in which there have been no net profits if the company has on hand net profits previously earned which had not been distributed.¹⁰ But it certain times be fixed by the charter of a company at which dividends shall be declared, and the directors fail to declare them at those times, they cannot do so subsequently so as to cover the period of their failure.¹¹ Upon amalgamation, the profits of one company already earned cannot be used to pay a dividend upon the stock of the consolidated corporation.¹² When a company has used its profits for improvements, it may borrow an equal amount of money for the purpose of paying a dividend.¹³ When funds cannot be borrowed on the credit of the company to pay a dividend which has been declared, but which cannot be otherwise paid because the directors have wrongfully invested the money set apart therefor in an extension of the enterprise, the affairs of the company should be wound up, the dividends paid, and the capital divided.¹⁴

1 *Carpenter v. New York etc. R'y Co.* 5 Abb. Pr. 277; *Bloom v. Metro-*

politan R'y Co. Law R. 3 Ch. 337; Salisbury v. Metropolitan R'y Co. 28 Law J. Ch. 249; Macaungall v. Jersey etc. Co. 2 Hun & M. 526; and cases cited infra, § 339. As to whether a sum paid by contractors as a penalty, but which may in certain events be returnable to them, can be applied to payment of a dividend, see Bloxam v. Metropolitan R'y Co. Law R. 3 Ch. 337; Salisbury v. Metropolitan R'y Co. 38 Law J. Ch. 249; S. C. 20 Law T. N. S. 70; S. C. 18 Week. R. 974.

2 *Vide infra, § 314.*

3 See cases cited *supra*, note 1. *Cf. § 252, supra.*

4 *Holmes v. Newcastle etc. R'y Co. 45 Law J. Ch. 333; Queen v. Liverpool etc. R'y Co. 21 Law J. Q. B. 284.*

5 8 Vict. ch. 16, § 121.

6 *Strong v. Brooklyn etc. R. R. Co. 93 N. Y. 426, 435; Seely v. New York etc. Bank, 3 Daly, 400; S. C. 73 N. Y. 608; Parker v. Mason, 8 R. I. 427.*

7 *Gratz v. Dodd, 4 Mon. B. 178, 187.*

8 *Main v. Mills, 6 Biss. 98; Hughes v. Vermont etc. Co. 72 N. Y. 207, 210; Carpenter v. N. Y. etc. R. R. Co. 5 Abb. Pr. 277; Att'y General v. State Bank, 1 Dev. & B. Eq. 544, 555; Elkins v. Camden etc. R. R. Co. 36 N. J. Eq. 233; Lockhardt v. Van Alstyne, 31 Mich. 76; 18 Am. Rep. 156; Pittsburgh etc. R. R. Co. v. Allegheny, 63 Pa. St. 123; Painesville etc. R. R. Co. v. King, 17 Ohio St. 534; Barnes v. Pennell, 2 H. L. Cas. 497; In re Mercantile etc. Co. Law R. 4 Ch. 475.*

9 Cook on Stock & Stockh. § 540.

10 *Mills v. Northern etc. R'y Co. Law R. 5 Ch. 621. Cf. Hoole v. Great Western R'y Co. Law R. 3 Ch. 22.*

11 *Gordon v. Richmond etc. R. R. Co. 78 Va. 501.*

12 *Chase v. Vanderbilt, 37 N. Y. Super. Ct. 334. Cf. March v. Eastern R. R. Co. 43 N. H. 515; S. C. 40 N. H. 548; 77 Am. Dec. 732.*

13 *Mills v. Northern etc. R'y Co. Law R. 5 Ch. 621; S. C. Law R. 4 Ch. 475; Stringer's Case, Law R. 4 Ch. 475. But see Hoole v. Great Western R'y Co. Law R. 3 Ch. 259, where it was said that if the directors have wrongfully invested earnings set apart for dividends, their only remedy is an increase of the capital stock.*

14 *New York etc. R. R. Co. v. Schuyler, 34 N. Y. 49.*

§ 298. **Of net earnings.**—As a general proposition, net earnings are the excess of the gross earnings over the expenditures defrayed in producing them, aside from and exclusive of the expenditure of capital laid out in constructing and equipping the works themselves.¹ These current expenditures embrace payments for steam-engines, for rails, for completing stations and the like, “which ought to have been and would have been paid at the time, had the defendants possessed the necessary funds for that purpose.”² Thus it has been said that ex-

penditures for station buildings, shops and fixtures, having been fairly and in good faith charged to account of earnings, will not be disallowed.³ But this language would seem to imply that the latter items might more properly have been charged to the construction account. Theoretically, the expenses chargeable to earnings, include the general expenses incurred in operating the works and keeping them in good condition and repair; whilst expenses chargeable to capital include those which are incurred in the original construction of the works and in the subsequent enlargement and improvement thereof.⁴ With regard, however, to those incurred in enlarging and improving the works, a difference of practice prevails amongst railroad companies. Some charge to construction account every item of expense, and every part and portion of every item which goes to make the road, or any of its appurtenances or equipments better than they were before;⁵ whilst others charge to ordinary expense account, and against earnings, whatever is taken for those purposes from the earnings, and is not raised upon bonds or issues of stock.⁶ The latter method is deemed the most conservative and beneficial for the company, and operates as a restraint against injudicious dividends and the accumulation of a heavy indebtedness.⁷ It is enacted by the English Companies' Clauses Act of 1845 that before apportioning the profits to be divided among the shareholders, the directors may, if they think fit, set aside thereout such sum as they may think proper to meet contingencies, or for enlarging, repairing or improving the works connected with the

undertaking, or any part thereof, and may divide the balance only among the shareholders.⁸

1 *Union Pacific R. R. Co. v. United States*, 93 U. S. 422, 423. As to what items are properly chargeable to revenue and capital account respectively, see *Mills v. Northern Ry etc. Co.* Law R. 3 Ch. 631, 631. As to whether office expenses can be charged to capital account, see *Blossam v. Metropolitan Ry Co.* Law R. 3 Ch. 337; *Salisbury v. Metropolitan Ry Co.* 33 Law J. 249; S. C. 20 Law T. N. S. 72; S. C. 13 Week. R. 175. As to whether debts incurred for extensions of a railway should be charged to the general capital account, see *Blossam v. Metropolitan Ry Co.* Law R. 3 Ch. 337.

2 *Corry v. Londonderry etc. Ry Co.* 29 Beav. 233.

3 *Union Pacific R. R. Co. v. United States*, 99 U. S. 422, 422.

4 *Union Pacific R. R. Co. v. United States*, 99 U. S. 422, 420.

5 *Union Pacific R. R. Co. v. United States*, 93 U. S. 402, 420, 421.

6 *Union Pacific R. R. Co. v. United States*, 99 U. S. 422, 421.

7 *Union Pacific R. R. Co. v. United States*, 93 U. S. 402, 421.

8 8 Vict. ch. 16, § 122.

§ 299. **Net earnings**—The practical difficulties of the subject an avenue to fraud.—Even with the best intentions on the part of the managers, it is difficult to distinguish between current expenses and permanent investments; as, for example, in determining what shall be charged to repairs and what to new construction. Thus, in cases where railroads substitute steel rails, costing sixty dollars per ton, for iron rails which cost fifty, and then sell the old iron for thirty; or where a wooden bridge needing repair, is replaced by an iron bridge, the first cost of which is much greater, yet which in the long run will be more economical than repairing the wooden structure.¹ The question is one of policy, which is usually left to the discretion of the directors.² The temptation, however, is to make expenses appear as small as possible, so as to have a large apparent surplus to divide.³ One method of doing this is to charge high rates for the transportation of the materials which a road uses in its own construction. The

earnings from which dividends are declared being thus increased, the construction account, for which money may be properly borrowed, becomes burdened with debt.⁴ But it is held that a company cannot properly deduct from its income account, charges for carrying its own property over its own road, unless it also add these items to expense account.⁵ So, again, when any important improvement is needed, such as an additional track, or any other matter which involves a large outlay of money, the owners of the road will hardly forego the entire suspension of dividends in order to raise the requisite funds for those purposes, but will rather take the ordinary course of issuing bonds or additional stock. But for making all ordinary improvements, as well as repairs, it is better for the stockholders, and all those who are interested in the prosperity of the enterprise, that a portion of the earnings should be employed.⁶ But it frequently happens that the management is far more interested in having the road declare large dividends, than in having its capital account on a sound basis.⁷ Accordingly the fund for the payment of dividends is often fraudulently increased by charging to the new construction account items of expense which should be charged to repairs, and then borrowing money to pay for the pretended construction.⁸ If then we find in the financial reports of a company paying large dividends, that the amounts expended for repairs are small, and for new construction large, without any marked change in the condition of the road, and that the floating debt continues to increase from year to year, there arises a strong pre-

sumption against the honesty of the corporate management.⁹

1 Hadley's *Railroad Transportation*, p. 60. *Cf.* Kirkman's *Railway Expenditures*, vol. 2, pp. 1-136.

2 *Union Pacific R. R. Co. v. United States*, 99 U. S. 402, 421.

3 *Union Pacific R. R. Co. v. United States*, 99 U. S. 402, 421.

4 See Hadley's *Railroad Transportation*, p. 61.

5 *Union Pacific R. R. Co. v. United States*, 99 U. S. 402, 420.

6 *Union Pacific R. R. Co. v. United States*, 99 U. S. 402, 421.

7 *Cf.* Herbert Spencer's *Railway Morals and Railway Policy*, Edinburgh Review, Oct. 1854.

8 Hadley's *Railroad Transportation*, pp. 60, 61.

9 Hadley's *Railroad Transportation*, pp. 61, 62.

§ 300. **Personal liability of corporate officers herein.**—To declare a dividend which the directors are aware cannot be paid except out of the capital stock, is pronounced "a most vicious and fraudulent course of conduct," for which they will be personally liable, not only in a civil action for damages to those whom they have deceived and injured,¹ but also in a criminal action for conspiracy.² And directors will be held personally liable to corporate creditors for misrepresentations to the stockholders, by which the latter were induced to declare a dividend impairing the capital stock of the company.³ But directors are not personally liable for a mere error in judgment, whereby a dividend declared and paid by them impairs the capital stock.⁴ There are cases holding that, where directors who have not been guilty of fraud have been compelled to make good to corporate creditors a dividend impairing the capital stock, they are entitled to be subrogated to the creditors' rights against the stockholders,⁵ unless, of course, there be some statute rendering them liable without reference to whether the dividend infringing the capi-

tal stock was declared innocently or fraudulently.⁶ The statutory liability of the directors herein may be barred by laches, where they have not been guilty of actual fraud.⁷

1 *Gratz v. Redd*, 4 Mon. B. 178, 194; *Hill v. Frazier*, 22 Pa. St. 330; *Burnes v. Pennell*, 2 H. L. Cas. 497, 531; *In re Alexander Palace Co.* 21 Ch. Div. 149; *Salisbury v. Metropolitan R'y Co.* 22 Law T. N. S. 839; *Flitcroft's Case*, 21 Ch. Div. 519; *Tarquand v. Marshall*, Law R. 4 Ch. 376; *Evans v. Coventry*, 8 De Gex, M. & G. 835. In Massachusetts the personal liability of the directors is to the corporate creditors only: *Smith v. Hurd*, 12 Met. 371; 46 Am. Dec. 690; *Chamberlin v. Huguenot Manuf. Co.* 118 Mass. 532; *Priest v. Essex Manuf. Co.* 115 Mass. 380. In Kentucky, it would seem, it is not to creditors, but only to the company and the stockholders: *Lexington etc. R. R. Co. v. Bridges*, 7 Mon. B. 556, 559; 46 Am. Dec. 528. In England to each shareholder: *Tarquand v. Marshall*, Law R. 4 Ch. 376.

2 *Burnes v. Pennell*, 2 H. L. Cas. 497.

3 *In re Exchange Banking Co.* 21 Ch. Div. 519; *In re County Marine Ins. Co.* Law R. 6 Ch. 104; *Main v. Mills*, 6 Biss. 98; *Scott v. Eagle Fire Ins. Co.* 7 Paige, 198. *Cf. Rance's Case*, Law R. 6 Ch. 104.

4 *Excelsior etc. Co. v. Lacey*, 63 N. Y. 422; *Stringer's Case*, Law R. 4 Ch. 475. *Cf. Gillett v. Moody*, 3 N. Y. 479; *Scott v. Central etc. R. R. Co. of Georgia*, 52 Barb. 45; *Keppel v. Petersburg R. R. Co.* Chase's Dec. 167; *Reid v. Eatonton Manuf. Co.* 40 Ga. 98.

5 *In re Alexander Palace Co.* 21 Ch. Div. 149; *Salisbury v. Metropolitan R'y Co.* 22 Law T. N. S. 839. But see *Hill v. Frazer*, 22 Pa. St. 330, under Pa. Act of April 7, 1849, § 9.

6 Companies Act of 1862, § 165; Mass. Stat. 1862, ch. 218, § 3; Mass. Stat. 1870, ch. 224, §§ 40, 42; Rev. Stat. of N. J. p. 178; Pa. Act of April 7, 1849, § 9; N. Y. 1 Rev. Stat. ch. 18, tit. 2, art. 1, § 1, § 10. After judgment against the company and return of *nulla bona*: *Chamberlain v. Huguenot Manuf. Co.* 118 Mass. 532, 536; *Priest v. Essex Manuf. Co.* 115 Mass. 380; *Williams v. Boice*, 38 N. J. Eq. 364.

7 *In re Mammoth Copperopolis*, 50 Law J. Ch. 11; *Williams v. Boice*, 38 N. J. Eq. 364.

§ 301. Net earnings and net profits distinguished—Interest on corporate debts.—Payments of interest on the bonded indebtedness of the company should not be charged to current expenditures.¹ And it is said that the expense account should not be charged with discount and interest on the floating debt, with interest on sinking-fund bonds, with the premium on gold to pay coupons, with the requirements of the sinking fund to pay the funded debt, nor with the premium on bonds redeemed.²

Although interest is payable out of earnings before any dividend can be made to stockholders, it cannot be deducted for the purposes of ascertaining the "net earnings" of the road;³ for, it is said, the bonded debt incurred for the purpose of construction and equipment is but another form of capital, analogous to preferred stock; and the interest accruing thereon is in the nature of a dividend on such capital. "It has nothing to do with, and cannot affect, the amount of the net earnings of the road."⁴ Net *earnings* are, strictly speaking, the gross receipts of the company less the expenses of the road necessary to earn them. But interest on debts and many other liabilities are to be paid out of these net earnings. After these obligations have been met, the surplus remaining constitutes the fund out of which dividends may be declared.⁵ The latter fund constitutes the net *profits* of the enterprise as distinguished from net *earnings*,⁶ or the synonymous term net *income*.⁷ The net profits of a company are sometimes designated by the term "surplus earnings."⁸

1 *Union Pacific R. R. Co. v. United States*, 99 U. S. 402, 422; *De Peyster v. American Fire Ins. Co.* 6 Paige, 486; *Scott v. Eagle Fire Ins. Co.* 7 Paige, 198; *Lexington etc. Ins. Co. v. Bage*, 17 Mon. B. 412; 46 Am. Dec. 528; Green's Brice's *Ultra Vires*, 161. Cf. *Corry v. Londonderry etc. R'y Co.* 29 Beav. 263.

2 *Union Pacific R. R. Co. v. United States*, 99 U. S. 402, 422. In this case many other items properly chargeable to the several accounts are considered.

3 *Union Pacific R. R. Co. v. United States*, 99 U. S. 402, 422.

4 *Union Pacific R. R. Co. v. United States*, 99 U. S. 402, 423.

5 *St. John v. Erie R'y Co.* 10 Blatchf. 271, 279; affirmed in 22 Wall. 136; *Warren v. King*, 108 U. S. 389, 398; *Van Dyck v. McQuade*, 86 N. Y. 38, 47.

6 *People v. Supervisors of Niagara*, 4 Hill, 20, 23; *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114.

7 *Phillips v. Eastern R. R. Co.* 138 Mass. 122. For further definition and explanation of "net profits" and similar terms, see *Warren v. King*, 108 U. S. 389; *St. John v. Erie R'y Co.* 22 Wall. 136; *Nickals v. New York etc. R. R. Co.* 21 Blatchf. 177; *Heard v. Eldredge*, 109 Mass. 258; 12 Am. Rep. 687; *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114; *Coltness etc.*

Co. v. Black, 51 law J. Q. B. 626; *Bloxam v. Metropolitan R'y Co.* Law R. 3 Ch. 337; *Bardwell v. Sheffield etc. Co.* Law R. 14 Eq. 517; *Hadley's Railroad Transportation*, pp. 58-62.

8 *Union Pacific R. R. Co. v. United States*, 99 U. S. 402; *Williams v. Western Union Tel. Co.* 93 N. Y. 162, 191.

§ 302. **Whether a company can have net earnings while in debt.**—The term “net earnings” does not imply that the company is wholly out of debt.¹ Nevertheless, the majority can overrule the minority upon the question of the division of profits while the debts of the company remain unprovided for.² It has been argued that there can never, properly speaking, be any available income or profit so long as the corporation has any debt remaining unpaid, but the contrary is well established both in the mercantile world and in the decisions of the courts. If only those companies which are free from debt could be properly said to have made any profits, “there is hardly a railway in the kingdom which could pay any dividends at all to their stockholders.”³ A company may even borrow money with which to pay a dividend to an amount equal to the excess of its assets over its liabilities.⁴

1 *Belfast etc. R. R. Co. v. Belfast*, 77 Me. 445; *Myles v. Northern etc. R'y Co.* Law R. 5 Ch. 621; *Barry v. Merchants' Exchange Co.* 1 Sand. Ch. 80, 307

2 *Stevens v. South Devon R'y Co.* 9 Hare, 313.

3 *Myles v. Northern etc. R'y Co.* Law R. 5 Ch. App. 621. *Acc. Mills v. Northern R'y etc. Co.* Law R. 5 Ch. 621; *Hadley's Railroad Transportation*, p. 58.

4 *Stringer's Case*, Law R. 4 Ch. 475; *Mills v. Northern R'y etc. Co.* Law R. 5 Ch. 621. But see *Hoole v. Great Western R'y Co.* Law R. 3 Ch. 269; *supra*, § 297, note 13.

§ 303. **To whom dividends belong**—As between transferrer and transferee.—A court will not take cognizance of the time during which a dividend was earned, in a contest between transferrer and

transferree. Although a dividend be earned before a transfer of stock, yet if it be not declared until after, the transferree is entitled to payment thereof;¹ for the profits of the enterprise, until set apart by the declaration of a dividend, remain a part of the stock itself, and will pass under a transfer of the shares.² The vendor is entitled to a dividend declared before, but made payable at a date subsequent to a transfer of shares.³ And there can be no apportionment between vendor and vendee, of a dividend declared, but payable at stated intervals.⁴ In case the transfer has not been registered, although the company will be protected in paying the dividend to the persons in whose name the stock stands recorded upon the corporate records,⁵ yet the transferree has a right to the dividends as against his transferer;⁶ unless, of course, there has been a contract between them to the contrary.⁷ The transferree of preferred stock stands in the shoes of his transferrer with respect to arrears of dividends not declared, unless the latter has by the terms of the contract expressly reserved them to himself.⁸ But arrears of dividends on preferred shares not declared, cannot be assigned apart from the stock itself.⁹ If the dividends have been declared and the arrearage is in the payment thereof only, the transferree acquires no right thereto.¹⁰ A sale of stock *in præsenti*, but payable and deliverable *in futuro*, constitutes the vendor a *quasi*-trustee for the purchaser, and the latter is entitled to all dividends accruing thereafter.¹¹ An offer to sell shares, which is subsequently accepted, entitles the vendee to dividends received by the owner while the offer was open.¹² A contract to sell on demand entitles the vend-

regular cash dividend, declared during the continuance of a life estate, belongs to the life tenant,¹ whether it were earned before or during the life tenancy.² But with respect to stock and property dividends the decisions are by no means uniform. The general rule in America as to disposing of stock or property dividends between life tenants and remainder-men, is that if a dividend of that nature accrued or was earned before the life estate arose, it shall be treated as principal and belong to the *corpus* of the estate, without reference to the time when it was declared or made payable; but when the dividend accrued or was earned after the life estate arose, then that it shall be considered as income and shall belong to the life tenant.³ In a recent case decided in Maine, where a corporation purchased a number of its shares from the State, paying for them by the issue of bonds, and distributed these shares among the stockholders as a stock dividend, it was held that the equitable and proper division of the shares between an owner of a life interest in the original stock and the remainderman, was to give the stock dividend to the latter, but the income on the stock distributed as a dividend to the life tenant.⁴ In Massachusetts a different rule prevails. In that State stock dividends, however made, are regarded as principal, and cash dividends, however large, as income.⁵ The Massachusetts rule is followed in Rhode Island,⁶ and somewhat tentatively in the District of Columbia,⁷ it has also become a part of the civil code of Georgia.⁸ But it is said to have "proved to be a very elastic rule in the State of its origin; for in *Leland v. Hayden*,⁹ while professing to adhere to

it, the court did in fact treat a cash dividend as capital, and a stock dividend as income."¹⁰ In England, the courts distinguish between ordinary or regular dividends and extraordinary dividends, the former going to the life tenant and the latter to the remainder-man.¹¹

1 Ware v. McCandish, 11 Leigh, 595; Cuming v. Boswell, 2 Jur. N. S. 1005; Barclay v. Wainwright, 14 Ves. 66; Norris v. Harrison, 2 Madd. 268; Preston v. Melville, 16 Sim. ; Clive v. Clive, Kay, 600; Murray v. Glasser 17 Jur. 816; Beach on Wills, § 211.

2 Jermain v. Lake Shore etc. R. R. Co. 91 N. Y. 483; Abercrombie v. Riddle, 3 Md. Ch. 320; Gifford v. Thompson, 115 Mass. 478; *Richardson v. Richardson*, 73 Me. 570; S. C. 43 Am. Rep. 352; Wright v. Tuckett, 1 Johns. & H. 266, and cases cited *supra*; Beach on Wills, § 211, and cases there cited.

3 *Vinton's Appeal*, 99 Pa. St. 434; S. C. 3 Am. Prob. Rep. 231; *Biddle's Appeal*, 99 Pa. St. 278; S. C. 3 Am. Prob. Rep. 443; *Roberts' Appeal*, 92 Pa. St. 407; *Thompson's Appeal*, 89 Pa. St. 36; *Moss's Appeal*, 83 Pa. St. 264; *Wiltbank's Appeal*, 64 Pa. St. 256; *Earp's Appeal*, 28 Pa. St. 308; *In re Thompson's Estate*, 11 Week. N. (Pa.) 482; *Ashurst v. Field*, 26 N. J. Eq. 1; *Van Doren v. Olden*, 19 N. J. Eq. 176; 97 Am. Dec. 650; *Lord v. Brooks*, 52 N. H. 72; *Wheeler v. Perry*, 18 N. H. 307; *Richardson v. Richardson*, 75 Me. 575; S. C. 46 Am. Rep. 428; *Cook on Stock & Stockh.* § 554; *Beach on Wills*, § 211; 19 Am. Law Rev. 737; 20 Am. Law Rev. 746. See also *Hite v. Hite*, (Ky. 1837) 2 R'y & Corp. Law J. 568 (not elsewhere reported). In this case STERLING B. TONEY, J., of the Louisville Law and Equity Court, reviews the authorities in favor of the American Pennsylvania rule, it is sometimes called, in a full and learned opinion, and by this decision places Kentucky in line with the States following the sounder and more general American rule.

4 *Gilkey v. Paine* (1888), 80 Me. 319, referring to *Richardson v. Richardson*, 75 Me. 570; 46 Am. Rep. 428; and to 19 Am. Law Rev. 737; 20 Am. Law Rev. 746.

5 *Minot v. Paine*, 99 Mass. 101; *Hemenway v. Hemenway*, 134 Mass. 446; S. C. 3 Am. Prob. Rep. 429, 436, note; *New England Trust Co. v. Eaton*, 140 Mass. 532; 54 Am. Rep. 493; *Leland v. Hayden*, 102 Mass. 542; *Duland v. Williams*, 101 Mass. 571; *Heard v. Eldridge*, 109 Mass. 268; 12 Am. Rep. 627; *Rand v. Hubbell*, 115 Mass. 461; *Beach on Wills*, § 211, and cases there cited.

6 *Petition of Brown*, 14 R. I. 371; *Busbee v. Freeman*, 11 R. I. 149; *Parker v. Mason*, 8 R. I. 427.

7 *Gibbens v. Mahon*, 4 Mackey, 120; 54 Am. Rep. 262.

8 Ga. Code, § 2256; *Miller v. Guerrard*, 67 Ga. 284.

9 102 Mass. 542.

10 *Gilkey v. Paine* (1888), 80 Me. 319. See *Richardson v. Richardson*, 75 Me. 570; 46 Am. Rep. 428, where the cases are reviewed. See also articles on this subject in 19 Am. Law Rev. 737; 20 Am. Law Rev. 746.

11 *In re Hopkins's Trust*, Law R. 18 Eq. 696; *In re Barton's Trust*, Law R. 5 Eq. 239; *Price v. Anderson*, 15 Sim. 473; *Barclay v. Wainwright*, 14 Ves. 66; *Paris v. Paris*, 10 Ves. 135, per Chancellor ELDON; *Witt v. Steer*, 13 Ves. 363; *Norris v. Harrison*, 2 Madd. 268; *Beach on Wills*, § 211, and cases there cited. But see *Sproule v. Bouche*, 29 Ch. Div. 69, reversed in the House of Lords, 2 R'y & Corp. Law J. 69.

§ 305. **To whom dividends are payable.**—In case of doubt with respect to the person entitled to receive a dividend, it is well settled that the company may safely pay the dividend to the person in whose name the stock is registered upon the corporate stock book;¹ without making inquiry as to whether the registered shareholder has transferred his stock;² and without requiring him to present his certificate of stock as evidence that he has not transferred his interest therein.³ But if a shareholder has sold his stock and caused it to be transferred upon the books of the company to the name of his vendee, without surrendering the certificates, the company will not be protected in paying dividends to the registered transferee as against the holder of the outstanding certificates; for it has been guilty of negligence in permitting the transfer without the surrender of the certificates, or has violated its obligations as a trustee for the protection of stockholders against unauthorized transfers.⁴ A stock-owner to whom no certificate has been issued is not thereby debarred from claiming his dividends.⁵ It has been said that after the company has been notified of a transfer of stock, although registration thereof has not been made upon the corporate records, the dividend may be paid to the transferee.⁶ As between the person holding the stock at the time that a dividend is declared and the owner at the time it is made payable, the former is entitled to receive the dividend.⁷ Upon the death of a shareholder, the company should pay dividends to his administrator until notified that he has transferred the stock;⁸ and before the heir is entitled to receive the payments, the shares must be trans-

ferred into his name upon the corporate records.⁹ The law of the domicile of the corporation determines whether a dividend upon stock owned by a married woman is payable to her or to her husband.¹⁰ To obviate the difficulties arising from the transfer of shares, it is customary to close the transfer books of the company a few days before the payment of a dividend; and while there has been, perhaps, no positive judicial declaration as to the legality of this practice, the plain tendency of the courts is to regard it as a lawful and regular exercise of control over the corporate affairs on the part of the management, even in the absence of charter provisions authorizing it.¹¹

1 *Brisbane v. Delaware etc. R. R. Co.* 94 N. Y. 204; S. C. 25 Hun, 438; *Jones v. Terre Haute etc. R. R. Co.* 29 Barb. 353.

2 *Brisbane v. Delaware etc. R. R. Co.* 94 N. Y. 204; S. C. 25 Hun, 438; *Cleveland etc. R. R. Co. v. Robbins*, 35 Ohio St. 483.

3 *Brisbane v. Delaware etc. R. R. Co.* 94 N. Y. 204; S. C. 25 Hun, 438; *Cleveland etc. R. R. Co. v. Robbins*, 35 Ohio St. 483; *Cook on Stock & Stockh.* § 542.

4 *Bank v. Lanier*, 11 Wall. 369; *Lowry v. Commercial etc. Bank, Taney*, 310; *Brisbane v. Delaware etc. R. R. Co.* 25 Hun, 438; *Magwood v. Railroad Bank*, 5 S. C. 379; *Brewster v. Sime*, 42 Cal. 139.

5 *Ellis v. Proprietors of Essex Merrimack Bridge*, 2 Pick. 243.

6 *Hill v. Newichawanick Co.* 48 How. Pr. 427; *Smith v. American Coal Co.* 7 Lans. 317; *Bell v. Lafferty*, 1 Pa. Sup. Ct. 454.

7 *Hill v. Newichawanick Co.* 71 N. Y. 593, S. C. 8 Hun, 459; S. C. 48 How. Pr. 427; *Spear v. Hart*, 26 N. Y. 420; *Bright v. Lord*, 51 Ind. 272; *De Gendre v. Kent*, Law R. 4 Eq. 283; *Wright v. Tuckett*, 1 Johns. & H. 266. *Cf.* *Brundage v. Brundage*, 60 N. Y. 544; S. C. 65 Barb. 397. *Cf.* *Hopper v. Sage*, 47 N. Y. Super. Ct. 77; *City of Ohio v. Cleveland etc. R. R. Co.* 6 Ohio St. 489. *Contra*, *Burroughs v. North Carolina etc. R. R. Co.* 67 N. C. 376; 12 Am. Rep. 611.

8 *Brisbane v. Delaware etc. R. R. Co.* 94 N. Y. 204.

9 *State v. New Orleans etc. R. R. Co.* 30 La. An. 308.

10 *Graham v. First National Bank*, 84 N. Y. 393; 38 Am. Rep. 528; S. C. 20 Hun, 325. *Cf.* *Dew v. Gould etc. Co.* 31 Cal. 629.

11 *Cook on Stock & Stockh.* § 542; *Jones v. Terre Haute etc. R. R. Co.* 57 N. Y. 205.

§ 306. The discretion of the directors with respect to declaring dividends.—It is usually with

the directors of a company to determine upon the expediency of declaring an ordinary dividend. It is in the discretion of the directors either to declare a dividend or to retain the profits in the treasury as a fund to meet probable or possible liabilities upon disputed claims,¹ or for the payment of probable future indebtedness, although it be not yet contracted.² Although the articles of association may provide that dividends shall be declared semi-annually, it is nevertheless within the discretion of the directors not to do so.³ The discretion of the directors as to declaring dividends is not to be restricted by the contracts of the promoters of the company with respect to the disposition of corporate profits.⁴ Their judgment of what part of the net profits should be distributed is not in general to be questioned by the shareholders.⁵ The directors, with the concurrence of a majority of the shareholders, may invest the net profits of the enterprise in its extension and development, when the working capital at their disposal is inadequate to the demands of the business; and dissenting shareholders cannot under such circumstances invoke the aid of a court of equity to require a dividend to be declared.⁶ The courts will interfere with the discretion of the directors with respect to declaring dividends only in rare and exceptional cases, where they are acting in bad faith or from a willful abuse of their discretion.⁷ And a very strong case must be made out by the stockholders, before a court will interfere with the discretion of the directors in this respect, and order a dividend to be declared.⁸ But a court of equity will interfere in cases where the directors have applied funds which

should have been distributed as dividends to purposes not warranted by the object of incorporation nor authorized by the charter of the company.⁹ And wherever there is a clear abuse of power on the part of the directors amounting to a breach of trust, the court will order a dividend to be declared.¹⁰

1 *Carpenter v. New York etc. R. R. Co.* 5 Abb. Pr. 277; *Cook on Stock & Stockh.* § 541.

2 *Karnes v. Rochester etc. R. R. Co.* 4 Abb. Pr. N. S. 107.

3 *Ely v. Sprague*, Clarke Ch. 151, where it was held that in such a case a stockholder cannot maintain a bill to restrain the collection or sale of the securities he had given for his shares.

4 *Coyote Gold etc. Co. v. Ruble*, 8 Or. 284; *Cook on Stock & Stockh.* § 541. *Cf.* *Richardson v. Railroad Co.* 44 Vt. 613.

5 *State v. Baltimore etc. R. R. Co.* 6 Gill. 363; *Karnes v. Rochester etc. R. R. Co.*, 4 Abb. Pr. N. S. 107. *Cf.* *Brown v. Buffalo etc. R. R. Co.* 27 Hun, 342.

6 *Pratt v. Pratt*, 33 Conn. 446. *Cf.* *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114.

7 *Chase v. Vanderbilt*, 62 N. Y. 307; *Thompson v. Erie R. R. Co.* 45 N. Y. 468; *Scott v. Eagle Fire Ins. Co.* 7 Paige Ch. 198; *Karnes v. Rochester etc. R. R. Co.* 4 Abb. Pr. 417; *Ely v. Sprague*, Clarke Ch. 351; *Howell v. Chicago etc. R. R. Co.* 51 Barb. 378; *Smith v. Prattville Manuf. Co.* 29 Ala. 503; *State v. Bank of Louisiana*, 6 La. 745; *Williston v. Michigan Southern etc. R. R. Co.* 13 Allen, 400; *Beers v. Bridgeport Spring Co.* 42 Conn. 117; *Pratt v. Pratt*, 33 Conn. 446; *Harris v. San Francisco etc. Co.* 41 Cal. 393; *Barnard v. Vermont etc. R. R. Co.* 7 Allen, 512; *Chaffee v. Rutland R. R. Co.* 55 Vt. 110; *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114; *Browne v. Monmouthshire R'y etc. Co.* 4 Eng. Law & Eq. 118; S. C. 13 Beav. 32; *Stevens v. South Devon R'y Co.* 9 Hare, 313.

8 *State v. Bank of Louisiana*, 6 La. 745; *Lambert v. Neuchatel Asphalt Co.* 51 Law J. Ch. 882. *Cf.* *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114; *Dent v. London Tramways Co.* 50 Law J. Ch. 190; S. C. 16 Ch. Div. 344; S. C. 1 Am. & Eng. R. R. Cas. 592; *Davison v. Gillies*, 16 Ch. Div. 192.

9 *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114; *March v. Eastern R. R. Co.* 43 N. H. 515; 77 Am. Dec. 732.

10 *Brown v. Buffalo etc. R. R. Co.* 27 Hun, 342; *Beers v. Bridgeport Spring Co.* 42 Conn. 17; *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114; *Browne v. Monmouthshire R'y etc. Co.* 4 Eng. Law & Eq. 118; S. C. 13 Beav. 32; *Stevens v. South Devon R'y Co.* 9 Hare, 313.

§ 307. English statutory restrictions upon the power to declare dividends.—In England, previously to every ordinary meeting at which a dividend was to be declared, the directors shall cause a

scheme to be prepared showing the profits, if any, for the period current since the preceding ordinary meeting at which a dividend was declared, and apportion the same, or so much thereof as they may consider applicable to the purposes of dividend, among the shareholders, according to the shares held by them respectively, the amount paid thereon, and the periods during which the same may have been paid, and shall exhibit such scheme at such ordinary meeting, and at such meeting a dividend may be declared according to such scheme.¹ These semi-annual reports of the directors are subject, however, to the approval of the board of auditors of the company. This board is composed of officers elected ordinarily by the shareholders, unless the special act incorporating the company directs that they be otherwise appointed.² They are thus independent of the directors, and act as a check upon their mismanagement or frauds. For no dividend can be paid by a company until its auditors have certified that the half-yearly accounts contain a full and true statement of the financial condition of the company, and that the dividend proposed to be declared on any shares is in good faith due thereon, after charging the revenue of the half-year with all expenses which ought to be paid thereout in the judgment of the auditors. If the directors differ from the judgment of the auditors with respect to the payment of any of the expenses out of the revenue of the half-year, the difference, if the directors desire it, shall be stated in the report to the shareholders, and the latter, at a general meeting, may decide thereon, and their decision shall, for the purposes of the dividend, be final and binding; but

if the difference of opinion between the auditors and the directors be not stated in the report, or, if stated, not acted upon by the shareholders, the judgment of the auditors shall prevail over that of the directors, and be final and binding.³ The concurrence of a majority of the auditors is sufficient to authorize a dividend, but provision is made for minority reports to the shareholders.⁴ Due authority is conferred upon the auditors to examine the books of the company, and to demand further accounts and vouchers from the directors, and at any time to make reports to the shareholders as to the condition of the company.⁵ The auditors need not necessarily be shareholders in the company.⁶

1 The Companies' Clauses Act of 1845, 8 Vict. ch. 16, § 120.

2 8 Vict. ch. 16, § 101. Or an additional auditor may be appointed by the Board of Trade upon the application either of the directors or of the shareholders: 31 & 32 Vict. §§ 119, 12 (1).

3 The Railway Companies Act of 1867, 30 & 31 Vict. ch. 127, § 30.

4 31 & 32 Vict. ch. 119, § 12 (4), (5).

5 30 & 31 Vict. ch. 127, § 30.

6 The Regulation of Railways Act of 1868, 31 & 32 Vict. ch. 119, § 11, repealing § 102 of the Companies' Clauses Act of 1845, 8 Vict. ch. 16.

§ 308. **Proceedings to compel directors to declare dividends.**—It is with great reluctance, and only where the stockholders have made out an exceptionally strong case, that a court of equity will so far interfere with the discretion of the directors of a company as to order that a dividend shall be declared.¹ Thus, although the debt of a corporation was funded and not payable for seventeen years, the court refused to order that a surplus fund of about half of the amount of the indebtedness should be distributed as a dividend. The board of directors, it was said, in their discretion

might do this, but no court would ever undertake to deal in such a manner with the funds of a corporation which was indebted to an amount at least double the fund sought to be distributed.² The stockholders have a certain claim to dividends, it is true, but their claims are always subordinate to the claims of creditors,³ and the latter approach much nearer to the position of ownership than the former.⁴ It has been said that in an action instituted by shareholders seeking to have a dividend declared, the court will take into consideration the fact that the complainants, if composing a majority of the stockholders, may refuse to re-elect the directors when their terms expire; or that, if in a minority, that they may sell their shares.⁵ This, however, must be considered poor law. If the shareholders delay to bring suit to require a dividend to be declared, until the company has become insolvent, their remedy is lost.⁶

1 *People v. Commissioners*, 35 N. Y. 423; S. C. 4 Wall. 244; *Utica v. Churchill*, 33 N. Y. 238; *Karnes v. Rochester etc. R. R. Co.* 4 Abb. Pr. N. S. 107; *Cunningham v. Vermont etc. R. R. Co.* 12 Gray, 411; *Waterman v. Troy etc. R. R. Co.* 8 Gray, 433; *McLoughlin v. Detroit etc. R. R. Co.* 8 Mich. 100; *City of Ohio v. Cleveland etc. R. R. Co.* 6 Ohio St. 489.

2 *Karnes v. Rochester etc. R. R. Co.*, 4 Abb. Pr. N. S. 107.

3 *Karnes v. Rochester etc. R. R. Co.* 4 Abb. Pr. N. S. 107; *Ryan v. Leavenworth etc. R'y Co.* 21 Kan. 365.

4 *Karnes v. Rochester etc. R. R. Co.* 4 Abb. Pr. N. S. 107.

5 *Barry v. Merchants' Exchange Co.* 1 Sandf. Ch. 280. See, also, *Wood's Railway Law*, § 66.

6 *Scott v. Eagle Fire Ins. Co.* 7 Paige, 198.

§ 309. **Injunctions in restraint of dividends.**— Under certain circumstances the directors of a corporation may be restrained by injunction from declaring a dividend; and even after it has been declared there are cases in which a court of equity will prohibit its payment.¹ Thus a company will

not be permitted to pay dividends out of funds necessary to make needed repairs.² So, when it appears that a dividend declared is likely to be paid out of a fund other than the net profits of the enterprise, its payment may be enjoined.³ And where there has been an overissue of stock, the payment of a dividend may be restrained by injunction until it can be determined which are the spurious certificates.⁴ Again, the creditors of an insolvent corporation may, by injunction, restrain the payment of a dividend.⁵ But the same circumstances under which an injunction restraining the company from declaring a dividend will be granted, are not necessarily sufficient to justify an injunction against the payment of one already declared.⁶ Thus, after a dividend has been declared, a court of chancery will not restrain its payment at the suit of a single shareholder.⁷ And there is a case decided in England under the Companies' Clauses Act of 1845,⁸ in which it was held that an action by a shareholder of a particular class, on behalf of the class, to restrain the payment of a declared dividend, cannot be maintained where all the other shareholders are not parties; upon the ground, it was said, that each of the shareholders has a separate right of action.⁹ But this decision seems difficult to reconcile with the principle upon which it was based.¹⁰

1 Underwood v. New York etc. R. R. Co. 17 How. Pr. 537; Carpenter v. New York etc. R. R. Co. 5 Abb. Pr. 277; *Karnes v. Rochester etc. R. R. Co.* 4 Abb. Pr. N. S. 107; McDougall v. Jersey etc. Co. 2 Hem. and M. 528; *Dent v. London Tramway Co.* 16 Ch. Div. 344; S. C. 1 Am. & Eng. R. R. Cas. 592; *Carlisle v. Southwestern R'y Co.* 13 Beav. 295; *Faucett v. Lourie*, 1 Drew. & S. 132; and cases cited *infra*. Cf. *Stevens v. South Devon R'y Co.* 9 Hare, 313; *Mills v. Northern R'y Co.* Law R. 5 Ch. 621.

2 *Dent v. London Tramway Co.*, 16 Ch. Div. 344; S. C. 1 Am. & Eng. R. R. Cas. 592.

3 *Cook on Stock & Stockh.* § 548; *McDougall v. Jersey etc. Co.* 2 Hem. & M. 528. But see *Ward v. Sittingbourne etc. R'y Co.* Law R. 9 Ch. 488.

4 *Underwood v. New York etc. R. R. Co.* 17 How. Pr. 537, one of the Schuyler fraud cases.

5 *Karnes v. Rochester etc. R. R. Co.* 4 Abb. Pr. N. S. 107.

6 *Carpenter v. New York etc. R. R. Co.* 5 Abb. Pr. 277; *Carlisle v. Southeastern R'y Co.* 1 Macn. & G. 689. See, however, *Coates v. Nottingham etc. Co.* 30 Beav. 86; and *Brown v. Monmouthshire R'y etc. Co.* 13 Beav. 32.

7 *Faucett v. Lourie*, 1 Drew & S. 192.

8 8 Vict. ch. 16, § 90.

9 *Carlisle v. Southeastern R'y Co.* 6 Rob. C. 670.

10 *Brown & Theobald's Railway Law*, 105, citing *Smith v. Cork etc. R'y Co.* Law R. 5 Eq. 65.

§ 310. **When an injunction to restrain a dividend will not be granted.**—The simple contract creditors of a solvent company cannot maintain a bill seeking an injunction to restrain the declaring of a dividend upon the ground that its payment would decrease the amount of the corporate assets.¹ And if, at the time a dividend was declared, the corporation was solvent, and a specific fund was appropriated for its payment, the fact that the company soon afterwards became insolvent will not enable the creditors to maintain an action to restrain the payment of the dividend.² A dividend will not be enjoined at the suit of another company claiming the right of distress for non-payment of toll charges.³ A court of equity will not restrain the payment of a dividend merely upon the ground that the directors have acted in violation of their duties to the public;⁴ nor merely because an account honestly made out and published in good faith contains immaterial errors in calculation;⁵ nor on the ground that there is not cash on hand to pay it in full.⁶ The New York courts have refused to enjoin the payment of dividends declared by

foreign corporations, except in cases of fraud injuriously affecting citizens of that State.⁷

1 *Mills v. Northern R'y etc. Co.* Law R. 5 Ch. 621.

2 *Lamar v. American Fire Ins. Co.* 6 Paige Ch. 482. In this case the insolvency was caused by an extensive fire, which occurred some time after the day on which the dividend was payable.

3 *South Yorkshire R'y Co. v. Great Northern R'y Co.* 9 Ex. 55.

4 *Brown v. Monmouthshire R'y etc. Co.* 13 Beav. 32; *Stevens v. South Devon R'y Co.* 9 Hare, 313.

5 *Yool v. Great Western R'y Co.* 20 Law T. N. S. 74.

6 *Stringer's Case*, Law R. 4 Ch. 475.

7 *Howell v. Chicago etc. R. R. Co.* 51 Barb. 373.

§ 311. **Proceedings to compel payment of dividends declared.**—The duty of declaring a dividend where there are funds in hand is indefinite and discretionary with the directors, and in no sense a duty due any particular member of the company; but after a dividend has been declared, the right thereto becomes individualized, and the duty to distribute in certain proportions attaches as a right in favor of each of the stockholders which may be enforced by legal proceedings,¹ in an action of general assumpsit for the amount due according to the terms of the resolution declaring the dividend;² or by bill in equity in a proper case,³ but payment cannot be compelled by *mandamus*.⁴ When a dividend has been declared, but the time of payment has not been fixed by the directors, an action to compel its payment cannot be maintained at law; a bill in equity is the only remedy.⁵

1 *Wood's Railway Law*, § 66, citing *Keppel v. Petersburg etc. R. R. Co.* Chase's Dec. 167; *Carpenter v. New York etc. R. R. Co.* 5 Abb. Pr. 277; *Le Roy v. Globe Ins. Co.* 2 Edw. Ch. 657; *Scott v. Central R. R. etc. Co. of Georgia*, 52 Barb. 45; *Jackson v. Newark Plank Road Co.* 31 N. J. Law, 277; *King v. Patterson etc. R. R. Co.* 29 N. J. 504; *City of Ohio v. Cleveland et. R. R. Co.* 6 Ohio St. 489; *Festial v. King's College*, 10 Beav. 491; *Davis v. Bank of England*, 2 Bing. 393; *Coles v. Bank of England*, 10 Ad. & E. 437.

2 *Jones v. Terro Hauts etc. R. R. Co.* 5 N. Y. 196; *Kane v. Bloodgood*,

7 Johns. Ch. 90; 11 Am. Dec. 417; *Keppel v. Petersburg R. R. Co.* Chase's Dec. 167; *Westchester etc. R. R. Co. v. Jackson*, 77 Pa. St. 321; *Jackson v. Newark Plank Road Co.* 31 N. J. 277; *King v. Patterson etc. R. R. Co.* 29 N. J. 504; *State v. Baltimore etc. R. R. Co.* 6 Gill, 363; *City of Ohio v. Cleveland etc. R. R. Co.* 6 Ohio St. 489; *Dalton v. Midland Counties R'y Co.* 13 Com. B. 474; *Coey v. Belfast etc. R'y Co. Ir. R.* 2 C. L. 112; *Faucett v. Laurie*, 1 Drew. & S. 192.

3 *Le Roy v. Globe Insurance Co.* 2 Edw. Ch. 657; *Beers v. Bridgeport Spring Co.* 42 Conn. 17.

4 *People v. Central etc. Co.* 41 Mich. 166; *Van Norman v. Central etc. Co.* 41 Mich. 166.

5 *Scott v. Eagle Fire Ins. Co.* 7 Paige, 203; *Pratt v. Pratt etc. Co.* 33 Conn. 446.

§ 312. The same subject, continued—Whether demand is requisite—Interest.—There are many cases in which it is held that the shareholders cannot maintain an action to enforce the payment of a dividend until demand has been made and refused at the place of payment;¹ and that interest and the statute of limitations do not begin to run until demand and refusal.² On the other hand it has been held that the institution of suit is, in itself, a sufficient demand;³ and that interest, being in the nature of damages for default of payment, is not dependent upon demand.⁴ In those jurisdictions in which demand is a condition precedent to an action to compel the payment of a dividend, a demand upon the bank or party through whom the dividend is made payable is held not sufficient.⁵

1 *Scott v. Central R. R. etc. Co. of Georgia*, 52 Barb. 45; *Granger v. Bassett*, 93 Mass. 492 (a will case). See also *Goldsmith v. Swift*, 25 Hun, 201; *Keppel v. Petersburg R. R. Co.* Chase's Dec. 167, 213; *State v. Baltimore etc. R. R. Co.* 6 Gill, 333; *King v. Patterson etc. R. R. Co.* 29 N. J. 504; *Hagar v. Union National Bank*, 63 Me. 509. A letter of inquiry is not a sufficient demand: *Scott v. Central R. R. etc. Co. of Georgia*, 52 Barb. 45.

2 *Boardman v. Lake Shore etc. R. R. Co.* 84 N. Y. 157, 187; *Keppel v. Petersburg R. R. Co.* Chase's Dec. 167, 213; *State v. Baltimore etc. R. R. Co.* 6 Gill, 333; *Philadelphia etc. R. R. Co. v. Cowell*, 28 Pa. St. 329; 70 Am. Dec. 128; *Philadelphia etc. R. R. Co. v. Hickman*, 28 Pa. St. 318. Interest on dividends upon preferred stock is not dependent upon demand having been made: *Boardman v. Lake Shore etc. R. R. Co.* 84 N. Y. 157, 188; *Prouty v. Michigan Southern R. R. Co.* 1 Hun, 655, 667.

3 *Robinson v. National Bank*, 95 N. Y. 637.

4 *Adams v. Fort Plain Bank*, 36 N. Y. 255.

5 *King v. Patterson etc. B. R. Co.* 29 N. J. 504.

§ 813. The same subject, continued—**Offset and counterclaim.**—In an action to enforce the payment of a dividend, the company may plead by way of *offset* a debt due it from the plaintiff upon an unpaid balance on the purchase price of the stock itself.¹ In England this has become a part of the statutory law of corporations, the Companies' Clauses Act of 1845 providing that "no dividend shall be paid in respect of any share until all calls then due in respect of that and every other share held by the person to whom such dividend may be payable shall have been paid."² But a corporation has no right to retain a debt due to it from a stockholder out of his dividend, by way of *counterclaim*,³ unless it has a lien upon the stock for debts due it.⁴

1 *Bates v. New York Insurance Co.* 3 Johns. Ch. 238; *King v. Patterson etc. B. R. Co.* 29 N. J. 504; *Citizens' etc. Ins. Co. v. Scott*, 45 Ala. 185; *Sargent v. Franklin Insurance Co.* 8 Pick. 90; *Hager v. Union National Bank*, 63 Me. 509. *Contra*, *Ex parte Winsor*, 3 Story, 411, where an application of a dividend to an unpaid call was held illegal. Mr. Cook, however, questions the soundness of this decision. See Cook on Stock & Stockh. § 547, note.

2 8 Vict. ch. 16, § 123.

3 *Att'y-General v. State Bank*, 1 Dev. & B. Ch. 545; *March v. Eastern B. R. Co.* 43 N. H. 515; 77 Am. Dec. 732.

4 *Hager v. Union National Bank*, 63 Me. 509.

§ 814. **Recovery of dividends illegally paid.**—The directors of a corporation may maintain an action against the shareholders to recover dividends which have been unlawfully declared and paid.¹ And dividends illegally paid to the shareholders may be recovered from them by corporate creditors after judgment against the company and return of execution unsatisfied.² A transferee of stock is

liable to refund dividends distributed after he purchased the shares; and it is immaterial that the creditor's claim against the corporation accrued prior to the transfer.³ A valid judgment against the company on a return of *nulla bona* is requisite; and this judgment against the company is to be regarded as at least *prima facie* evidence of the validity of the creditors' claims.⁴ The receiver, also, of an insolvent company may recover dividends improperly paid, and in the same proceedings obtain an injunction against the corporate creditors to restrain them from suing individually to recover the funds thus illegally disposed of.⁵ It is immaterial that the shareholders received the dividends innocently, having no actual knowledge of the fact that the capital stock had been infringed upon.⁶ But a dividend declared in good faith, and believed at the time to be warranted by the financial condition of the company, cannot be recovered by the corporate creditors upon its subsequent insolvency.⁷ A shareholder who has been compelled to repay more than his equitable proportion of a dividend is entitled to contribution from the other members of the company.⁸ Where there has been no actual knowledge on the part of the subscriber that a dividend received by him in good faith had been illegally declared, the statute of limitations runs in his favor from the time that it was declared.⁹

1 *Lexington Life etc. Ins. Co. v. Page & Richardson*, 17 Mon. B. 412; 66 Am. Dec. 165.

2 *First National Bank v. Smith*, 6 Fed. Rep. 215; *Wood v. Dummer*, 3 Mason, 308; *Railroad Co. v. Howard*, 7 Wall. 392; *Curran v. State*, 15 How. 304; *Johnson v. Laffin*, 5 Dill. 65, note; *Hastings v. Drew*, 76 N. Y. 9; *Bartlett v. Drew*, 57 N. Y. 587; *Osgood v. Laytin*, 43 Barb. 463; *McLean v. Eastman*, 21 Hun, 312; *Bank of St. Marys v. St. John*, 25 Ala. 566; *Gratz v. Redd*, 4 Mon. B. 178; *Heman v. Britton* (1886), 88 Mo. 549; *Bartholomew v. Bentley*, 15 Ohio, 659; *Rance's Case*, Law R. 6 Ch. 104. Cf. *Williams v. Eoice*, 38 N. J. Eq. 364; *Pacific R. R. Co. v. Cutting Jr.* 27

Fed. Rep. C38; *Passhall v. Whitrett*, 11 Ala. 472; *Story's Equity* (13th ed.), § 1232. But see *Spear v. Grant*, 16 Mass. 9, 15; *Vose v. Grant*, 15 Mass. 506.

3 *Hastings v. Drew*, 76 N. Y. 9, 18; *Hurlburt v. Taylor*, 62 Wis. 607, 613, 614.

4 *Hastings v. Drew*, 76 N. Y. 9, 15, distinguishing *Miller v. White*, 50 N. Y. 137; *Sturges v. Vanderbilt*, 73 N. Y. 384, and cases cited *supra*; *McMahon v. Macy*, 51 N. Y. 155. Cf. *Hurlburt v. Taylor*, 62 Wis. 607.

5 *Osgood v. Laytin*, 5 Keyes, 521; *Lexington Life etc. Ins. Co. v. Page & Richardson*, 17 Mon. B. 412; 66 Am. Dec. 165. Cf. *Butterworth v. O'Brien*, 33 Barb. 192; *McLean v. Eastman*, 21 Hun, 312.

6 *Main v. Mills*, 6 Biss. 98, and note; *Hastings v. Drew*, 76 N. Y. 919; *Osgood v. Laytin*, 3 Keyes, 521; *Sagory v. Dubois*, 3 Sand. Ch. 456; *Lexington Life etc. Ins. Co. v. Page & Richardson*, 17 Mon. B. 412; 66 Am. Dec. 165; *Gratz v. Redd*, 4 Mon. B. 178; *Bank of St. Marys v. St. John*, 25 Ala. 566; *Clapp v. Peterson*, 104 Ill. 26; *National Trust Co. v. Miller*, 33 N. J. Eq. 155. Cf. *Sawyer v. Hoag*, 17 Wall. 610; *Railroad Co. v. Howard*, 7 Wall. 392; *Curran v. State*, 15 How. 304; *Wood v. Dummer*, 3 Mason, 308.

7 *Main v. Mills*, 6 Biss. 93; *Reid v. Eatonton etc. Co.* 40 Ga. 98; *In re Mercantile etc. Co.* Law R. 4 Ch. 475.

8 *Bartlett v. Drew*, 57 N. Y. 587.

9 *Lexington Life etc. Ins. Co. v. Page & Richardson*, 17 Mon. B. 412; 66 Am. Dec. 165.

CHAPTER XIII.

INCREASE AND REDUCTION OF CAPITAL STOCK.

- § 315. Authority to increase or decrease capital stock dependent upon legislative grant.
- § 316. A court cannot order an issue in excess of the charter limit.
- § 317. When the legislature may authorize increase or reduction of capital stock.
- § 318. Of general statutes authorizing increase or reduction of capital stock.
- § 319. Increase of capital stock—The New York statutes.
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- § 321. Increase of capital stock—The English statutes.
- § 322. Statutes authorizing increase or reduction strictly construed.
- § 323. The legislative grant vests in the stockholders, not in the directors.
- § 324. The manner of effecting an increase or reduction.
- § 325. The validity of an increase of capital stock not to be questioned collaterally.
- § 326. Stockholders entitled to take new stock at par.
- § 327. Effect of reduction upon stockholders' liability to creditors.

§ 815. Authority to increase or decrease capital stock dependent upon legislative grant.—A corporation having issued stock to the full amount authorized by its charter, can neither increase nor diminish that amount without the consent of the legislature, unless authority to do so has been expressly granted in its charter, or by some general law of the State.¹ But when the charter of a company does not fix its capital stock more definitely than to declare its maximum and minimum amount, a corporation having begun business with less than the maximum capital, may, without legislative

grant, increase it to the higher limit.² Except under those circumstances, the power of the corporate authorities to increase or reduce the capital stock can be derived only from the legislature;³ and without a legislative grant, no by-law of the corporation or resolution of the shareholders, conferring that power upon the directors, is operative, whether it be sought to accomplish it directly by an increase or reduction of the number of the shares, or indirectly, by a change in their par value.⁴ The officers, directors and stockholders of a corporation cannot, even by an unanimous agreement, made under an honest misapprehension of their powers, effect a valid increase thereof.⁵ An illegal increase or diminution may be restrained by injunction.⁶ And where a company has distributed a portion of the capital stock among its shareholders, they may be compelled to return it.⁷

1 *In re Ebbw Vale etc. Co.* 4 Ch. Div. 827.

2 *Gray v. Portland Bank*, 3 Mass. 364; 3 Am. Dec. 156; *Somerset etc. R. R. Co. v. Cushing*, 45 Me. 524.

3 *Scoville v. Thayer*, 105 U. S. 143; *Knowlton v. Congress etc. Co.* 14 Blatchf. 334; *Sutherland v. Olcott*, 95 N. Y. 93, 100; *New York etc. R. R. Co. v. Schuyler*, 31 N. Y. 30; *Mechanics' Bank v. New York etc. R. R. Co.* 13 N. Y. 599; *Lathrop v. Kneeland*, 46 Barb. 432; *Salem Mill Dam Co. v. Ropes*, 6 Pick. 23; 19 Am. Dec. 363; *Moses v. Ocoee Bank*, 1 Lea, 398; *Grangers' Life etc. Ins. Co. v. Kamper*, 73 Ala. 525; *Ferris v. Ludlow*, 7 Ind. 617; *In re Ebbw Vale etc. Co.* 4 Ch. Div. 827; *Droitwich etc. Co. v. Curzon*, Law R. 3 Ex. 35, 42; *Stace & Worth's Case*, Law R. 4 Ch. 682; *Morawetz on Corp.* § 434. *Cf. Chetlain v. Republic Life Ins. Co.* 86 Ill. 220; *In re Kirkstall Brewery Co.* 5 Ch. Div. 535.

4 *In re Financial Co.* Law R. 2 Ch. 714; *Sewell's Case*, Law R. 3 Ch. 131; *Smith v. Goldsworthy*, 1 Q. B. 430. *Cf. Teasdale's Case*, Law R. 9 Ch. 54. But see *Ambergate etc. R'y Co. v. Mitchell*, 4 Ex. 540; S. O. 6 Eng. R'y Cas. 234.

5 *People v. Parker Vein Coal Co.* 10 How. Pr. 543.

6 *O'Brien v. Chicago etc. R. R. Co.* 53 Barb. 568.

7 *Holmes v. Newcastle etc. Co.* 45 Law J. Ch. 383.

§ 316. A court cannot order an issue of stock in excess of the charter limit.—When a corpora-

tion has issued valid certificates of stock to the full extent of all the shares which, by statute or the charter of the company, it may issue, no court can order the issuance of other shares, because in that respect the powers of the corporation have been exhausted.¹ Thus a company that has issued the full amount of its capital stock cannot be ordered to perform specifically a contract by which it has agreed to pay for services or property in the corporate stock;² although it has been held in Massachusetts that the company may be compelled to purchase shares of its own stock and reissue them to the aggrieved party by way of specific performance of the contract;³ yet, generally, the remedy in such a case is by an action for damages.⁴ It is better, however, that in an action upon a contract of this kind the prayer should be in the alternative, asking for specific performance, or for damages in case the former cannot be decreed.⁵

1 *Mechanics' Bank v. New York etc. R. R. Co.* 13 N. Y. 599; *Williams v. Savage Manuf. Co.* 3 Md. Ch. 418; *Smith v. North American Mining Co.* 1 Nev. 423.

2 *Finley Shoe etc. Co. v. Kurtz*, 34 Mich. 89.

3 *Machinists National Bank v. Field*, 126 Mass. 315. *Acc. Boston etc. R. R. Co. v. Richardson*, 135 Mass. 473; *Pratt v. Machinists' National Bank*, 123 Mass. 110.

4 *Finley Shoe etc. Co. v. Kurtz*, 34 Mich. 89.

5 *Cook on Stock & Stockh.* § 284.

§ 317. When the legislature may authorize increase or reduction of capital stock.—When the amount of the capital stock of a corporation has been prescribed by its charter, the power of the legislature to authorize its increase or reduction depends either upon the unanimous consent of the stockholders or upon an express reservation to the

State of the power to amend.¹ This rule rests upon the general principle as laid down in the *Dartmouth College case*,² that the charter is a contract which, under the federal constitution, no State can impair by any subsequent legislation. Although, when the power to amend the corporate charter has been reserved by the State, dissenting shareholders are not ordinarily released from their duties and liabilities by an amendment authorizing an increase or diminution of the capital stock,³ yet, if the increase or reduction authorized is so great as to work a material change in the liability of the shareholders, creating in effect a new contract, dissenting shareholders are thereby discharged.⁴ And the legislature cannot, under the power to amend, authorize a reduction prejudicial to the vested rights of prior corporate creditors.⁵

1 *Buffalo etc. R. R. Co. v. Dudley*, 14 N. Y. 333; *Joslyn v. Pacific etc. Co.* 12 Abb. Pr. N. S. 329; *Illinois River R. R. Co. v. Zimmer*, 20 Ill. 654; *Peoria etc. R. R. Co. v. Elting*, 17 Ill. 429.

2 *Dartmouth College v. Woodward*, 4 Wheat. 513.

3 *East Lincoln v. Davenport*, 94 U. S. 801; *Nugent v. Supervisors*, 19 Wall. 241; *Mowsey v. Indianapolis etc. R. R. Co.* 4 Biss. 78; *Buffalo etc. R. R. Co. v. Dudley*, 14 N. Y. 333; *Schenectady etc. Co. v. Thatcher*, 11 N. Y. 102; *Troy etc. R. R. Co. v. Kerr*, 17 Barb. 531; *Moore v. Hudson River R. Co.* 12 Barb. 156; *Whitehall etc. R. R. Co. v. Meyers*, 13 Abb. Pr. N. S. 34; *Pacific R. R. Co. v. Hughes*, 23 Mo. 291; 41 Am. Dec. 265; *East Tennessee etc. R. R. Co. v. Gammon*, 5 Sneed, 507; *Danbury etc. R. R. Co. v. Wilson*, 22 Conn. 435; *Noyes v. Spaulding*, 27 Vt. 420; *Pish v. Johnson*, 21 Ind. 299; *Ottawa etc. R. R. Co. v. Black*, 79 Ill. 232; *Hay v. Ottawa etc. R. R. Co.* 61 Ill. 422; *Newhall v. Galena etc. R. R. Co.* 14 Ill. 273; *Burlington etc. R. R. Co. v. White*, 5 Iowa, 409.

4 *Hughes v. Antietam etc. Co.* 34 Md. 316; *Oldtown etc. R. R. Co. v. Veazie*, 39 Me. 571.

5 *In re State Ins. Co.* 14 Fed. Rep. 28; S. C. 11 Biss. 301; *Cooper v. Frederick*, 9 Ala. 742; *Palfrey v. Paulding*, 7 La. An. 333; *In re Credit Foncier*, Law R. 11 Eq. 336; *In re Telegraph Construction Co.* Law R. 10 Eq. 384.

§ 318. Of general statutes authorizing increase or reduction of capital stock.—General provision for the increase and reduction of capital

stock is made by the statutes of New York,¹ Massachusetts,² New Jersey,³ Pennsylvania,⁴ Missouri,⁵ Illinois,⁶ and Ohio.⁷ And by the constitution and statutes of Louisiana corporations are authorized to increase⁸ but not to reduce their capital stock.⁹ The constitutions of Illinois and Nebraska provide that no railway corporation shall increase its capital stock except under general laws,¹⁰ and with the consent of the holders of a majority of the shares.¹¹ The constitutions of several States make similar provisions applicable to all corporations.¹² The consent of the shareholders must be given at a special meeting, and notice of the intention to increase must be given, thirty days before in some States,¹³ and in others sixty.¹⁴

1 *Vide infra*, §§ 319, 320.

2 Mass. Pub. Stat. ch. 106, § 34; ch. 112, § 60.

3 Rev. Stat. of N. J. (1877) p. 131, § 24; p. 1290, § 29.

4 Brightley's Purdon's Dig. p. 343, § 3334; p. 348, § 55, *et seq.*; Laws of Penn. April 29, 1874.

5 Mo. Rev. Stat. § 930; State v. McGrath, 86 Mo. 239.

6 Ill. Ann. Stat. (1885) ch. 32, § 50; ch. 114, § 15.

7 Ohio Rev. Stat. (1886) §§ 3262-3264.

8 La. Const. art. 26; La. Rev. Stat. § 693.

9 Seignouret v. Home Ins. Co. 24 Fed. Rep. 332.

10 Stimson's Am. Stat. Law (Jan. 1, 1886), § 453.

11 Stimson's Am. Stat. Law (Jan. 1, 1886), § 453, citing the constitutions of Pa., Mo., Ark., Cal., Colo., Ala. and La.

12 Stimson's Am. Stat. Law (Jan. 1, 1886), § 513, citing the constitutions of Penn., Mo., Ark., Cal., Colo., Ala. and La.

13 Stimson's Am. Stat. Law (Jan. 1, 1886), § 453, citing the constitutions of Colo., Ala. and La.

14 Stimson's Am. Stat. Law (Jan. 1, 1886), § 453, citing the constitutions of Pa., Mo., Ark., Cal., Ill. and Neb. In the last two, however, the provisions relate only to railway corporations.

§ 319. Increase of capital stock—The New York statutes.—In New York the increase of the capital stock of railway companies is regulated by

the General Railroad Act of 1850,¹ which provides that in case the capital stock of any company, formed under that act, is found to be insufficient for constructing and operating the road, the company may increase its capital stock from time to time, with concurrence of two-thirds in amount of all its stockholders, and with the written approval of the State engineer and surveyor, until there shall be appointed a board of railroad commissioners, and after that, with the written approval of that board. Careful provision is made in the act for the calling of the meeting at which the vote is to be taken, and for the due notification of the shareholders, both by written notice through the mail, and by advertisement in the public journals; and a penalty of fine and imprisonment is imposed upon officers or directors violating the provisions of the act.² Another act in that State authorizes an increase in the capital stock whenever it becomes necessary in order to carry out any plan or agreement of reorganization, declaring that it shall be lawful for a majority of the directors to file a certificate with the secretary of State, which shall set forth the fact of the insufficiency of the existing capital stock and the additional amount required; and thereupon, with the approval of the State engineer and surveyor, the company shall have authority "to issue stock as fully as if the same had been mentioned or set forth in the original certificate of incorporation. Said additional certificate shall be filed in the office of the secretary of State within two months after the passage of this act"³

1 N. Y. Laws of 1850, ch. 140, § 9.

2 N. Y. Laws of 1850, ch. 140, § 9, as amended by Laws of 1880, ch. 133.

3 N. Y. Laws of 1830, ch. 153, § 1.

§ 320. Reduction of capital stock—The New York statute.—With respect to the decrease of the capital stock of a company, it is enacted in New York that any corporation or company organized under general or special laws of that State may, by complying with the provisions of the act, diminish its capital stock to any amount which may be deemed sufficient and proper for the corporate purposes; but nothing in the act is to be construed as relieving any shareholder from any personal liability existing prior to the reduction, nor as interfering with or affecting any law existing at the time of its passage, authorizing corporations theretofore organized to reduce their capital stock.¹ The act proceeds to give directions with respect to the notification of the shareholders, through the mails and by publication, of the meeting at which they are to vote upon the question of reduction, and regarding the conducting of the meeting; and then provides that if two-thirds of all the shares shall be voted in favor of diminution, a certificate shall be prepared, showing a compliance with the act, the amount of capital actually paid in, the whole amount of the debts and liabilities of the company, and the amount to which the capital stock is to be diminished; that this certificate shall be signed, verified and acknowledged by the chairman of the meeting, and filed by him in the county clerk's office and with the secretary of State, with the approval of the comptroller indorsed thereon, to the effect that the reduced capital is sufficient for the proper purposes of the company and in excess of all debts not secured by trust mortgages, and that the actual market value of the stock prior to the

reduction was less than par. When this certificate has been filed, the capital stock shall be diminished, and the capital left in the possession of the company over and above the amount to which the capital stock has been reduced shall be returned to the shareholders *pro rata*.³

1 N. Y. Laws of 1878, ch. 264, § 1.

2 N. Y. Laws of 1878, ch. 264, §§ 2, 3.

§ 321. Increase of capital stock.—The English statutes.—In England the increase of the capital stock of corporations is regulated by the Companies' Clauses Act of 1863,¹ by the Railway Construction Facilities Act of 1864,² and by the Railway Companies Act of 1867. The latter makes provision for the raising of additional share or loan capital in cases where companies are unable to meet their engagements with creditors.³ When a previously existing corporation becomes re-incorporated under the Railways Construction Facilities Act of 1864, the certificate provided for in that act may authorize the company to increase its capital stock.⁴ By the Companies' Clauses Act of 1863, it was provided that a vote of three-fifths of the shareholders present personally or by proxy at a meeting especially convened for that purpose, shall be necessary to authorize the issue of new ordinary or new preference shares, unless the special enabling act provides for a different majority.⁵ If, after creating new shares and stock, the company determines not to issue them all, those remaining unissued may be canceled.⁶ If the original ordinary stock or shares are at a premium at the time of the issue of the new, the latter is to be offered at par to the holders of

the former in proportion, as nearly as conveniently may be, to the number of original shares held by them respectively,⁷ the offer to be made by letter,⁸ and the new shares, or portions of stock to vest in the shareholders upon acceptance of the offer.⁹ If the offer be not accepted within a month it will be deemed to have been declined. But the directors are empowered to allow a shareholder, who on account of absence abroad or other satisfactory cause omitted to signify his acceptance, to take the stock after the expiration of that time.¹⁰ Subject to the foregoing provisions, unappropriated new shares may be disposed of in such manner as the directors think advantageous to the company,¹¹ even, it would seem, at less than par.¹²

1 26 & 27 Vict. ch. 118, §§ 12, 13, 16-21.

2 27 & 28 Vict. ch. 127, § 56.

3 30 & 31 Vict. ch. 127, § 6; *In re Bristol etc. R'y Co.* 6 Eq. 448, 454; S., C. 16 Week. R. 1112.

4 27 & 28 Vict. ch. 121, § 56.

5 23 & 27 Vict. ch. 118, §§ 12, 13.

6 26 & 27 Vict. ch. 118, § 16.

7 26 & 27 Vict. ch. 118, § 17.

8 26 & 27 Vict. ch. 118, § 18.

9 26 & 27 Vict. ch. 118, § 19.

10 26 & 27 Vict. ch. 118, § 20.

11 26 & 27 Vict. ch. 118, § 21.

12 The clause, "but so that not less than the full nominal amount of any share or portion of stock be payable or paid in respect thereof," contained in the section above cited, being repealed by the Companies' Clauses Act of 1863, 32 & 33 Vict. ch. 48, § 5.

§ 322. Statutes authorizing increase or reduction strictly construed.—Statutes authorizing an increase or decrease of capital stock are, in general, strictly construed. A grant of authority to reduce is not implied by a statute conferring the power to increase, nor *vice versa*.¹ But charter authority to

issue bonds convertible into stock, by necessary implication confers authority to increase the capital stock to the amount of the bonds.² And authority to a corporation to increase its capital stock in such manner as may be deemed advisable is sufficient to warrant an increase by the issue of guarantied stock.³ Where the consent of all the shareholders of a corporation is obtained thereto, an increase in the capital stock, even though not made with all the prescribed statutory formalities, will be binding.⁴ A subscriber accepting and voting upon new stock not issued according to the provisions of the enabling act, cannot take advantage of the irregularity after the insolvency of the company to defeat an action by a receiver seeking to recover the balance of the purchase price remaining unpaid;⁵ for the attorney-general alone can properly question the regularity of its issue under such circumstances.⁶ A subscriber to shares issued to increase the capital stock may recover money paid thereon if it appear that the issue was irregular;⁷ and a note given in payment of shares, which cannot be shown not to be part of an irregular issue, is not collectable.⁸

1 Sutherland v. Alcott, 93 N. Y. 93.

2 Belmont v. Erie R'y Co. 52 Barb. 637, 699; Ramsey v. Erie R'y Co. 38 How. Pr. 193, 216. Cf. Jenks v. Central R. R. Co., citing 52 Barb. 637, 675; Van Allen v. Illinois Central R. R. Co. 7 Bosw. 515; Heath v. Erie R'y Co. 8 Blatchf. 347; People v. Erie R'y Co. 38 How. Pr. 129.

3 Gordon v. Richmond etc. R. R. Co. 73 Va. 501.

4 Poole v. West etc. Association, 30 Fed. Rep. 513, 515. State v. McGrath, 86 Mo. 231, which seems to hold to the contrary, turns upon the fact that the formality which was not complied with, *v z.*, public notice of the increase, was one in which the public was interested, and could not, therefore, be waived by the stockholders.

5 Pullman v. Upton, 96 U. S. 329; Chubb v. Upton, 95 U. S. 685; Upton v. Jackson, 1 Flippin, 413.

6 Pullman v. Upton, 96 U. S. 329; Chubb v. Upton, 95 U. S. 685; In re Reciprocity Bank, 22 N. Y. 9; Kansas City Hotel Co. v. Harris, 51 Mo. 464.

7 *Spring Company v. Knowlton*, 103 U. S. 49, affirming S. C. *sub. nom. Knowlton v. Congress etc. Co.* 14 Blatchf. 364; *Peckham v. Smith*, 9 How. Pr. 438.

8 *Merrill v. Gamble*, 46 Iowa, 615; *Merrill v. Beaver*, 48 Iowa, 648. Cf. *Merrill v. Beaver*, 50 Iowa, 404.

§ 323. **The legislative grant vests in the stockholders, not in the directors.**—Ordinarily, when the charter of a corporation has been amended under a power reserved to the State, an acceptance by the directors, without the express consent of the stockholders, is sufficient to give effect to the amendment;¹ but a grant of authority to a corporation to increase or reduce its capital stock, vests in the shareholders and not in the directors;² notwithstanding that the charter may provide that “all the corporate powers of said corporation shall be vested in and exercised by a board of directors.”³ For a change so organic and fundamental as an increase or reduction of the capital stock cannot be made by the directors alone, unless expressly authorized thereto. The general power to perform all corporate acts, conferred upon the directors, “refers to the ordinary business transactions of the corporation, and does not extend to a reconstruction of the body itself, or to an enlargement of its capital stock.”⁴ But the change having been made by the directors, and being acquiesced in by the shareholders, will be as legal and binding upon the latter as though it had been expressly authorized by them at a shareholders’ meeting.⁵ An amendment to the charter of a company taking from the shareholders and vesting in the directors the power to authorize an increase of the capital stock, is not such a fundamental change in the constitution of the corporation as will release dissenting share-

holders from obligation upon their stock.⁶ When, as is sometimes the case, the charter of the company directs that the power to increase the capital stock shall be exercised by the directors, their decision as to the necessity for an increase, if unbiased by fraudulent motives, is conclusive.⁷

1 *Illinois River R. R. Co. v. Zimmer & Casey*, 20 Ill. 654, 661; *Barret* (reported "Banit") v. *Alton etc. R. R. Co.* 13 Ill. 508; *Sprague v. Illinois River R. R. Co.* 19 Ill. 174. *Cf.* *Lincoln etc. Bank v. Richardson*, 1 Greenl. 79, where it was held that mere user without express acceptance either by directors or stockholders, is ordinarily sufficient.

2 *Railway Co. v. Allerton*, 18 Wall. 233; *People v. Vein Coal Co.* 10 How. Pr. 513; *Percy v. Millaudon*, 3 La. 598, 595; 6 Martin, N. E. 616; 17 Am. Dec. 196; *Crandall v. Lincoln*, 52 Conn. 73, 99; *Eidman v. Bowman*, 58 Ill. 444; *Finley Shoe etc. Co. v. Kurtz*, 34 Mich. 89; *Cook on Stock & Stockh.* § 285; *Morawetz on Corporations* (2nd ed.), § 512; *Taylor on Corporations* (2nd ed.), § 228; *Green's Brice's Ultra Vires* (2nd ed.), § 495.

3 *Railway Co. v. Allerton*, 18 Wall. 233.

4 *Railway Co. v. Allerton*, 18 Wall. 233.

5 *Railway Co. v. Allerton*, 18 Wall. 235, 235; *Payson v. Stoever*, 2 Dill. 424; *Eidman v. Bowman*, 58 Ill. 444; *Sewell's Case*, Law R. 3 Ch. 131; *Lane's Case*, 1 De Gex, J. & S. 504. That shareholders may by subsequent action at a corporate meeting ratify and render valid irregular acts of directors done in good faith and not impairing the obligations of the company to its creditors, see *Supervisors v. Schenck*, 5 Wall. 772, 782; *McLaughlin v. Detroit etc. R. R. Co.* 8 Mich. 100, 103. See also cases enumerated by *Cook on Stock & Stockh.* § 285.

6 *Cook on Stock & Stockh.* § 285; *Payson v. Withers*, 5 Biss. 269; *Payson v. Stoever*, 2 Dill. 428.

7 *Sutherland v. Olcott*, 95 N. Y. 93.

§ 324. **The manner of effecting an increase or reduction.**—If a corporation desire to increase its capital stock, this may be done by the issue of new shares, or by increasing the par value of those already out standing.¹ If the increase is to be made by the issue of new shares, the manner of effecting the increase not being prescribed in the enabling act, it is immaterial whether it be made by awarding the stock to the stockholders, as dividends in lieu of money, retaining the money for the purposes of the company, or by paying the stockholder the divi-

dends in cash from the earnings of the enterprise, and selling the stock in the market to raise money for the corporate purposes.³ When it is provided by the statutes or constitution of a State that stock shall not be issued except for money, property or services, an additional issue of stock cannot be based upon an increase in the value of the property in which the original stock is invested.³ The vote of the shareholders is not *per se* an increase of the capital stock. Until the new stock is subscribed for, at least, there is an element of uncertainty respecting the increase; and the shareholders may, at any time before the new stock is taken, reconsider their vote.⁴ Reduction may be accomplished by the company purchasing and extinguishing its own shares;⁵ or the company may refund to its stockholders a definite portion of each share.⁶ A company cannot, however, reduce its capital stock by purchasing and extinguishing a portion of its shares, without the consent and against the protest of any of its stockholders, when it would operate for the relief and benefit of those from whom the stock is purchased, and would increase the liability of the remaining stockholders.⁷ The purchase of its own shares may or may not operate to reduce the capital stock at the option of the company. If it has authority to make a reduction, and manifests an intention to produce that result by the purchase, and the shares are extinguished, a reduction will thereby be effected; but where there is no such intention, or where the authority to reduce is not possessed by the company, it may reissue them at any time.⁸

1 *Currier v. Lebanon Slate Co.* 56 N. H. 262. *Cf. Howell v. Chicago etc. Ry Co.* 51 Barb. 378.

2 *Howell v. Chicago etc. R'y Co.* 51 Barb. 378. On the issue of stock dividends, see §§ 285, 286.

3 *Fitzpatrick v. Dispatch etc. Co.* (1887), 83 Ala. 604.

4 *Terry v. Eagle Lock Co.* 47 Conn. 141.

5 *City Bank v. Bruce*, 17 N. Y. 507; *Williams v. Savage Manuf. Co.* 3 Md. Ch. 413; *Currier v. Lebanon Slate Co.* 53 N. H. 262; *State v. Smith*, 43 Vt. 266; *Taylor v. Miami Exporting Co.* 6 Ohio, 176; S. C. 5 Ohio St. 162; 23 Am. Dec. 785.

6 *Currier v. Lebanon Slate Co.* 56 N. H. 262.

7 *Currier v. Lebanon Slate Co.* 56 N. H. 262.

8 *City Bank v. Bruce*, 17 N. Y. 507; *Williams v. Savage Manuf. Co.* 3 Md. Ch. 413; *American Railroad Frog Co. v. Haven*, 101 Mass. 398; *State v. Smith*, 48 Vt. 266; *Currier v. Lebanon Slate Co.* 56 N. H. 262; *Chetlain v. Republic Life Ins. Co.* 86 Ill. 220; *Taylor v. Miami Exporting Co.* 6 Oh o, 176; S. C. 5 Ohio, 162; 22 Am. Dec. 785. Cf. *Percy v. Millaudon*, 3 La. 568 587; 17 Am. Dec. 196.

§ 325. **The validity of an increase of capital stock not to be questioned collaterally.**—There are some defenses available in an action to enforce a subscription to the original stock of a company which cannot be plead in a similar action upon a subscription to additional stock. Technical objections to the validity of the contract of subscription are regarded in these cases unfavorably.¹ So, also, the subscriber cannot plead successfully that the whole amount of the increase has not been subscribed for, as he may in case of a subscription to the original stock;² nor will he be heard to allege the illegality of the increase, the regularity and legality of an issue of stock being a question to be raised only in direct proceedings for that purpose instituted against the corporation by the attorney-general.³ For, although an increase of the capital stock may have been irregularly and unlawfully made, yet stockholders who have subscribed thereto, who have accepted the certificates and have received dividends upon the shares, are held to be estopped from pleading the illegality as against corporate creditors.⁴

1 *Kansas City Hotel Co. v. Hunt*, 57 Mo. 126.

2 *Nutter v. Lexington etc. R. R. Co.* 6 Gray, 85; *Clarke v. Thomas*, 34 Ohio St. 46. *Vide supra*, §§ 105, 106, 107.

3 *Chubb v. Upton*, 95 U. S. 665; *Pullman v. Upton*, 96 U. S. 328; *In re Reciprocity Bank*, 22 N. Y. 9; *Kansas City Hotel v. Harris*, 51 Mo. 464.

4 *Chubb v. Upton*, 95 U. S. 665; *Veeder v. Mudgett*, 95 N. Y. 298; *Sheldon etc. Co. v. Eickemeyer etc. Co.* 90 N. Y. 607, 612; *Kent v. Quicksilver Mining Co.* 78 N. Y. 159, 187; *Aspinwall v. Sacchi*, 57 N. Y. 331; *Buffalo etc. R. R. Co. v. Cary*, 26 N. Y. 75; *Eaton v. Aspinwall*, 19 N. Y. 119; *In re Miller's Dale Co.* 31 Ch. Div. 211. *Cf.* *Cook on Stock & Stockh.* § 238; *Herman on Estoppel* (2d ed.), §§ 1178, 1248; *Morawetz on Corporations* (2d ed.), §§ 761-767; *Thompson on Liability of Stockholders*, §§ 160 *et seq.*, 407 *et seq.* But see 1 *Lindley on Partnership* (4th ed.), 134; and 2 *Ibid.* 1349.

§ 326. **Stockholders entitled to take the new stock at par.**—When a company determines to increase its capital stock, each holder of the original stock has a right to subscribe for and purchase at par¹ a proportionate amount of the new stock² as nearly as it may be fixed in integral shares,³ provided he avail himself of the right within the time prescribed, or, if none be fixed, within a reasonable time.⁴ This right exists as well where, upon the organization of the company, the whole amount of capital stock authorized by the charter was not issued, and the increase is by issue of the remainder, as where the corporation has been granted authority by statute to increase the capital stock beyond the amount fixed by the charter;⁵ but the right does not extend to a reissue of old shares purchased by the corporation. These may be disposed of by the directors to whomsoever they will.⁶ Any attempt to deprive an original shareholder of his right to subscribe to his proportionate part of the increased capital stock may be enjoined by a court of equity;⁷ or, if he has been already deprived of it, he may sue the company by a special count in assumpsit, and recover for the loss,⁸ the measure of damages

being the amount by which the market value of the new shares at the time they were issued exceeded the par value thereof, with interest on the excess.⁹ In such proceedings the plaintiff must prove demand and tender of payment within a reasonable or the specified time.¹⁰ And each shareholder must sue in his own name only, the liability of the corporation in these cases being several and not joint.¹¹ The holders of scrip, convertible at a certain time into the stock of the company, are not entitled to share *pro rata* with the stockholders in an increase of stock made before the time for the conversion of the scrip certificates into stock.¹²

1 Cunningham's Appeal, 108 Pa. St. 546; 26 & 27 Vict. ch. 118, § 17.

2 In re Wheeler, 2 Abb. Pr. N. S. 364; Pratt v. American Bell Telephone Co. (1886), 141 Mass. 225; Gray v. Portland Bank, 3 Mass. 364; 3 Am. Dec. 156; Mass. Gen. Stat. ch. 106, § 37; ch. 112, § 58; Reese v. Bank of Montgomery, 31 Pa. St. 78; 72 Am. Dec. 726; Bank of Montgomery v. Reese, 26 Pa. St. 143; Eidman v. Bowman, 58 Ill. 444; Jones v. Morrison, 31 Minn. 140; 26 & 27 Vict. ch. 118, § 17. *Contra*, Ohio Ins. Co. v. Nunnemacher, 15 Ind. 294. Mr. Wood questions the application of this rule to railway corporations, and cites Miller v. Illinois Central R. R. Co. 24 Barb. 312; Ohio Ins. Co. v. Nunnemacher, 15 Ind. 294; and Curry v. Scott, 54 Pa. St. 270. *Vide* Wood's Railway Law, § 72. But the first of these cases holds merely that the shareholders have no right to demand a gratuitous distribution of the new stock in proportion to the amount of original stock held by them: Miller v. Illinois Central R. R. Co. 24 Barb. 312, 330. The second case turned upon the construction of a clause in the charter, conferring upon the directors the power to increase the stock "on such terms and conditions and in such manner as to them shall seem best," which was held to exclude the shareholders' right to demand that they be allowed to subscribe for the new stock: Ohio Ins. Co. v. Nunnemacher, 15 Ind. 294, 296; S. C. 10 Ind. 234. The third case cited by Mr. Wood does not involve an increase of capital stock, but holds that a railway company having a portion of its originally authorized capital stock undisposed of may permit one who is not a stockholder to subscribe for the same: Curry v. Scott, 54 Pa. St. 270, 275.

3 Reese v. Bank of Montgomery, 31 Pa. St. 78; 72 Am. Dec. 726; 26 & 27 Vict. ch. 118, § 17.

4 Brown v. Florida Southern R'y Co. 19 Fla. 472; Hart v. St. Charles Street R. R. Co. 30 La. An. 758, where it is also held that a verbal notification by the shareholder that he will take the new stock is sufficient to render the company liable in damages for disposing of it to others: Terry v. Eagle Lock Co. 47 Conn. 141; Sewall v. Eastern R. R. Co. 9 Cush. 5. ⁵ Within one month in England: 26 & 27 Vict. ch. 118, § 20. *Supra*, § 321.

⁶ Pratt v. American Bell Telephone Co. (1886), 141 Mass. 225; Eidman v. Bowman, 58 Ill. 444; Angell & Ames on Corporations (11th ed.),

§§ 554, 555. *Contra*, *Currie v. Scott*, 24 Pa. St. 270, 275, 276, distinguishing *Gray v. Portland Bank*, 3 Mass. 364; 3 Am. Dec. 156; and *Reese v. Bank of Montgomery County*, 7 Casey, 78.

6 *Hartridge v. Rockwell*, Chart. R. M. 260; *Page v. Smith*, 48 Vt. 266. If the corporation uses its surplus to buy up some of its own stock, the stockholders have no right to claim this *pro rata* until it is ordered to be divided among them: *Wood's Railway Law*, § 72, citing *Coleman v. Columbia Oil Co.* 51 Pa. St. 74; *Wiltbank's Appeal*, 64 Pa. St. 256; *St. John v. Erie R. R. Co.* 10 Blatchf. 271; *Bradley v. Holdsworth*, 3 Mees. & W. 422.

7 *Dausman v. Wisconsin etc. Co.* 40 Wis. 418, where it was held that the injunction should be upon the corporation itself and not upon its directors personally, for they may be changed from time to time, and thus the decree be rendered ineffective. *Contra*, *Sewall v. Eastern R. R. Co.* 9 Cush. 5; *Gray v. Portland Bank*, 3 Mass. 364; 3 Am. Dec. 156; where it was held that the remedy could be only by an action at law for damages.

8 *Eldman v. Bowman*, 58 Ill. 444; *Sewall v. Eastern R. R. Co.* 9 Cush. 5; *Gray v. Portland Bank*, 3 Mass. 364; 3 Am. Dec. 156.

9 *Eldman v. Bowman*, 58 Ill. 444; *Gray v. Portland Bank*, 3 Mass. 364; 3 Am. Dec. 156; *Reese v. Bank of Montgomery*, 51 Pa. St. 78; 72 Am. Dec. 726.

10 *Wilson v. Bank of Montgomery*, 29 Pa. St. 537.

11 *Dausman v. Wisconsin etc. Co.* 40 Wis. 418; *Williams v. Savage Manuf. Co.* 3 Md. Ch. 418; *Cook on Stock & Stockh.* § 286, where these points are ably considered.

12 *Pratt v. American Bell Telephone Co.* 141 Mass. 225; 55 Am. Rep. 465. *Acc.* *Miller v. Illinois Central R. R. Co.* 24 Barb. 312.

§ 327. **Effect of reduction upon stockholders' liability to creditors.**—Upon a reduction of capital stock, the shareholders may properly claim a distribution of the money which the corporate body has no longer the right to use as capital.¹ But the sum to be divided is not always the difference between the original nominal capital and the amount to which it is decided to reduce it. For the nominal capital may not have been all paid in, or the property of the corporation may have depreciated in value. So, then, the sum to be distributed is the excess of the capital actually on hand over the amount available for the payment of debts, as determined by an actual inventory of the corporate assets.² As a general rule, to which there are few, if any, exceptions, a stockholder who conveys or assigns

his shares to the corporation without reference to the intent or object of the transfer, and receives in exchange a portion of the capital stock, holds the money so received subject to the superior equities of corporate creditors, being a trustee for them *quoad hoc*.³ So then the shareholders avoid no liability to prior corporate creditors by a reduction of the capital stock, whether it be made by decreasing the par value of the shares, or by a diminution of their number.⁴ But credit extended to a corporation, after a reduction, is presumed to have been given upon the faith of the capital as reduced.⁵

1 Seeley v. New York etc. Bank, 78 N. Y. 608, affirming S. C. 8 Daly, 400; N. Y. Laws of 1878, ch. 264, § 3; *supra*, § 320.

2 Strong v. Brooklyn Crosstown R. R. Co. 93 N. Y. 426.

3 Cook on Stock & Stockh. § 282; Crandall v. Lincoln, 52 Conn. 73, 100. Cf. Zuleta's Claim, Law R. 5 Ch. 444.

4 In re State Ins. Co, 11 Biss. 301; S. C. 14 Fed. Rep. 28; N. Y. Laws of 1878, ch. 264, § 1; *supra*, 320; Dane v. Young, 61 Me. 160; Bedford R. R. Co. v. Bowser, 48 Pa. St. 29, and cases cited *infra*, n. 5.

5 Cooper v. Frederick, 9 Ala. 742; Palfrey v. Paulding, 7 La. An. 353; Hepburn v. Exchange etc. Co. 4 La. An. 87; and cases cited *supra*, n. 4.

CHAPTER XIV.

SALES AND TRANSFERS.

- § 328. Of the transferable nature of stock—Transfers by gift, by will, and by succession, etc.
- § 329. Transfers by contract—The *quasi*-negotiable nature of stock certificates.
- § 330. The rights of a *bona-fide* purchaser, founded in estoppel.
- § 331. Of the competency of the parties to a contract for the sale of stock.
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- § 333. Of the competency of a corporation to buy its own shares—The American rule.
- § 334. Transfer by mortgage and pledge.
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§ 354. The same subject, continued—Circumstances from which fraud will not be presumed.

§ 355. Remedies of the parties defrauded.

§ 328. Of the transferable nature of stock—**Transfers by gift, by will and by succession, etc**—The right of alienation is an incident of the ownership of stock, and any by-law of the company prohibiting the exercise of this privilege, or imposing any restrictions upon it, is held to be in restraint of trade, and against public policy.¹ The common law regards shares of stock as personal property,² capable of alienation or succession in any of the modes by which personal property may be transferred.³ For example, shares of stock may be transferred by gift,⁴ provided the gift be not against public policy, nor in fraud of the rights of other stockholders;⁵ and for this purpose mere delivery is sufficient.⁶ When the gift has been once duly made it cannot be revoked.⁷ But a gift of stock *causa mortis* is revoked by the recovery of the donor, even though the transfer has been registered.⁸ So again, stock may be transmitted by will.⁹ A legatee accepting a bequest of stock must pay calls thereon due and unpaid at the time of testator's death.¹⁰ A general legatee of stock is not entitled to dividends until the expiration of the statutory period for the settlement of the estate.¹¹ But a legatee of a specific bequest of stock takes all dividends and profits accruing after the death of his testator.¹² Stock may also be transmitted by death, bankruptcy, insolvency and marriage.¹³

1 *Bank of Attica v. Manufacturers etc. Bank*, 20 N. Y. 556; *Moore v. Bank of Commerce*, 52 Mo. 377; *Fechheimer v. National Exchange Bank*, 79 Va. 80; *Sargent v. Franklin Ins. Co.* 8 Pick. 90; 19 Am. Dec. 306; *Farmers' etc. Bank v. Wasson*, 48 Iowa, 336.

- 2 *Vide supra*, § 62.
- 3 Cook on Stock & Stockh. § 331.
- 4 De Caumont v. Bogert, 36 Hun, 382.
- 5 Nickerson v. English (1886), 142 Mass. 267.
- 6 Reed v. Copeland, 50 Conn. 472. *Contra*, *Baltimore etc. Co. v. Mall*, 19 Am. & Eng. Corp. Cas. 49. That a gift of stock *causa mortis* may be made by mere delivery of the certificates without any written transfer, see *Walsh v. Sexton*, 55 Barb. 251; *Alberton v. Lang*, 10 Bosw. 362. *Contra*, in England, as to railway stock, which can be transferred only by deed: *Moore v. Moore*, 43 Law J. Ch. 617.
- 7 *Delamater's Estate*, 1 Whart. (Pa.) 362; *Standing v. Bowning*, 27 Ch. Div. 341; *Deemmer v. Pitcher*, 5 Sim. 35.
- 8 *Stainland v. Willott*, 3 Macn. & G. 664.
- 9 *Eckfeld's Estate*, 7 Week. Notes Cas. (Pa.) 19; *Millard v. Bailey*, Law R. 1 Eq. 378; *Barton v. Cooke*, 5 Ves. 461, and cases cited *infra*.
- 10 *Jacques v. Chambers*, 2 Coll. 435.
- 11 *Webster v. Hale*, 8 Ves. 410.
- 12 *Loring v. Woodward*, 41 N. H. 391. He has no title, however, of dividends declared before the testator's death, although remaining unpaid: *Perry v. Maxwell*, 2 Dev. Eq. 487.
- 13 8 Vict. ch. 16, § 18, where this is implied by the provisions for registration in such cases. *Vide infra*, the chapter on REGISTRATION OF TRANSFERS.

§ 329. **Transfer by contract—The quasi-negotiable nature of stock certificates.**—Certificates of stock are not, strictly speaking, negotiable instruments;¹ and it is said that “no commercial usage can give to such an instrument the attributes of negotiability.”² They are likened to warehouse receipts, bills of lading and other such *quasi* negotiable paper.³ While the phrase “*quasi-negotiable*” conveys no accurate well-defined meaning, still it describes better than any other brief expression, the nature of those instruments which, although not negotiable in the sense of the law merchant, are so framed and so dealt with that they frequently “convey as good a title to the transferee as if they were negotiable.”⁴ Certificates of stock indorsed in blank with an irrevocable power of attorney to register the transfer, approach as nearly the char-

acter of negotiable paper as the nature of the property will admit, title thereto passing from one to another by mere delivery;⁵ and any purchaser may fill the blanks and demand of the company that new certificates be issued in his name.⁶

1 *Cecil National Bank v. Watsontown*, 105 U. S. 17; *Pollard v. Vinton*, 105 U. S. 5; *Weaver v. Barden*, 49 N. Y. 286, 288; *McNeil v. Tenth National Bank*, 46 N. Y. 325; *Mechanics' Bank v. New York etc. R. R. Co.* 13 N. Y. 599, 627; *Loeb v. Peters*, 63 Ala. 243; *Tiedman v. Knox*, 53 Md. 612; *Scwall v. Boston etc. Co.* 86 Mass. 277; *Barstow v. Savage etc. Co.* 64 Cal. 391; *Weyer v. Second National Bank*, 57 Ind. 198, 208; *Mandlebaum v. North American etc. Co.* 4 Mich. 465, 473; *Emery's Sons v. Irving National Bank*, 25 Ohio St. 360.

2 *Shaw v. Spencer*, 100 Mass. 382; *Sherwood v. Meadow Valley etc. Co.* 50 Cal. 417.

3 *Johnson v. Laffin*, 103 U. S. 800; *Shaw v. Railroad Co.* 101 U. S. 504; *McAllister v. Kuhn*, 96 U. S. 89; *Lanier v. Bank*, 11 Wall. 369; *Black v. Zacharie*, 3 How. 483; *Hubbell v. Drexel*, 11 Fed. Rep. 115; *Weaver v. Barden*, 49 N. Y. 286; *McNeil v. Tenth National Bank*, 46 N. Y. 325; *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Mechanics' Bank v. New York etc. R. R. Co.* 13 N. Y. 599; *First National Bank v. Bryce*, 78 Kv. 42; *Ross v. South Western R. R. Co.* 53 Ga. 514; *Duke v. Cahawba etc. Co.* 10 Ala. 82; *State v. North Louisiana R. R. Co.* 34 La. An. 947; *Smith v. Crescent City Co.* 34 La. An. 1378; *Strange v. Houston etc. R. R. Co.* 53 Tex. 162; *Stollenwerck v. Thatcher*, 115 Mass. 224; *Shaw v. Spencer*, 100 Mass. 382; *Prall v. Tilt*, 27 N. J. Eq. 393; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24; *First National Bank v. Northern R. R. Co.* 58 N. H. 203; *Campbell v. Morgan*, 4 Bradw. 100; *Wood's Appeal*, 92 Pa. St. 379; *Finney's Appeal*, 99 Pa. St. 593; *Burton v. Patterson* 12 Phila. 397; *Conant v. Seneca County Bank*, 1 Ohio St. 298.

4 *Daniel on Negotiable Instruments*, § 1708.

5 *Lanier v. Bank*, 11 Wall. 369, 377; *Leitch v. Wells*, 48 N. Y. 585, 613; *McNeil v. Tenth National Bank*, 46 N. Y. 325; *Duke v. Cahawba etc. Co.* 10 Ala. 82; 44 Am. Dec. 472; *Tome v. Parkersburg R. R.-Co.* 39 Md. 36; *Bridgeport Bank v. New York etc. R. R. Co.* 30 Conn. 231, 275; *Wood's Appeal*, 92 Pa. St. 379; *Wood's Railway Law*, § 95.

6 *Commercial Bank v. Kortright*, 22 Wend. 348; *Dunn v. Commercial Bank*, 11 Barb. 580; *Bridgeport Bank v. New York etc. R. R. Co.* 30 Conn. 231.

§ 330. The rights of a bona-fide purchaser, founded in estoppel.—A bona-fide purchaser for value, receiving certificates of stock properly indorsed in blank, without notice that his vendor is acting as agent, takes the stock free from any equities subsisting between the agent and his principal. The owner of the stock by indorsing it in blank

thereby makes a representation that it will pass with a good title to any one on his taking it in good faith and for value, and having put it in the power of his agent to hand over the certificates with this representation to those who, relying upon it, are thereby induced to alter their position,¹ he will be estopped from repudiating the sale.² It appears therefore that the rights of the *bona-fide* holder of certificates of stock as against the true owner of the stock itself, to whom the apparent owner has either sold or pledged it, do not depend upon a negotiable character in the certificates, but rest upon the principle of estoppel—that the true owner having conferred upon another by a written transfer all the *indicia* of ownership, is estopped to assert title to it as against a third person, who has in good faith purchased it for value from the apparent owner.³ It is true that simply intrusting the possession of a chattel to another as a depositary, pledgee, or other bailee, is insufficient to prevent the real owner reclaiming his property in case of an unauthorized disposition of it by the person thus intrusted with its possession; for he can convey no greater right or title thereto than has been conferred upon him by the real owner;⁴ but if the owner intrusts not only the possession, but also written evidence of title and power of disposition over it, he is deemed as intending that it shall be disposed of at the pleasure of the depositary, so far at least as respects innocent third persons having no notice of the real intention.⁵ And the rights of the purchaser do not depend upon the actual title or authority of the party with whom he deals directly, but are derived from the acts of the real owner, by which the latter is pre-

cluded from disputing, as against the innocent purchaser, the existence of the title, or power to convey, which, through negligence or mistaken confidence, he caused or allowed to be vested in the party making the conveyance.⁶ To such an extent, says the leading authority on this subject,⁷ has the law of estoppel been applied to protect a *bona-fide* purchaser of stock, that he is protected now in almost every instance where he would be in the purchase of a promissory note or other negotiable instrument. "The courts are steadily extending the application of the law of estoppel herein, and in the course of time it is possible that certificates of stock may become *more negotiable than negotiable instruments themselves*."⁸

1 *Rumball v. Metropolitan Bank*, 2 Q. B. 194.

2 *McNeil v. Tenth National Bank*, 46 N. Y. 325; *Honold v. Meyer*, 36 La. An. 585; *Strange v. Houston etc. R. R. Co.* 53 Tex. 163; *Dovey's Appeal*, 97 Pa. St. 153. *Cf.* *State Bank v. Cox*, 11 Rich. Eq. 344; *Gulick v. Markham*, 6 Daly, 129; *Linnard's Appeal* (Pa. 1886), 6 East Rep. 877; *West etc. Co's Appeal*, 81 Pa. St. 19; *Otis v. Gardner*, 105 Ill. 436; *Martin v. Sedgwick*, 9 Beav. 333; *Taylor on Corporations*, § 795. *Contra*, *Taylor v. Great etc. R'y Co.* 4 De Gez & J. 559, holding that stock cannot be validly transferred by indorsement in blank; *Donaldson v. Gallet*, Law R. 3 Eq. 274. And conversely, it follows, of course, that one not purchasing in good faith does so at his peril: *Talmage v. Third National Bank*, 91 N. Y. 531; *Weaver v. Borden*, 49 N. Y. 286; *Crocker v. Crocker*, 31 N. Y. 507. In *Moodie v. Seventh National Bank*, 3 Week. Notes Cas. (Pa.) 118, it was held that if payment be partly made by setting off an antecedent debt, the vendee loses to that extent his position as *bona-fide* purchaser. *Cf.* *Dovey's Appeal*, 97 Pa. St. 153.

3 *Wood's Appeal*, 92 Pa. St. 379, 390. *Acc.* *Matthews v. Massachusetts National Bank*, 1 Holmes, 396; *Moore v. Metropolitan National Bank*, 55 N. Y. 41, 47; *Fatman v. Lobach*, 1 Duer, 354; *Mount Holly etc. Co. v. Ferris*, 17 N. J. Eq. 117; *Moodie v. Seventh National Bank*, 3 Week. Notes Cas. (Pa.) 118; *Walker v. Detroit Transit R'y Co.* 47 Mich. 338, 347; *Rumball v. Metropolitan Bank*, 2 Q. B. 194; *Ex parte Sargent*, Law R. 17 Eq. 273. *Cf.* *Briggs v. Massey*, 42 Law T. 49; *Taylor on Corporations*, § 795.

4 *Wood's Appeal*, 92 Pa. St. 379, 390.

5 *Wood's Appeal*, 92 Pa. St. 379, 390.

6 *McNeil v. Tenth National Bank*, 46 N. Y. 325, 329.

7 *Cook on Stock & Stockh.* § 416.

8 *Cook on Stock & Stockh.* § 416.

§ 331. Of the competency of the parties to a contract for the sale of stock.— The purchase by

railway companies of stock in other corporations has been considered in a preceding chapter.¹ It may be said here, however, that the law regards such transactions unfavorably; and under certain circumstances an injunction will issue to restrain one corporation from obtaining control over another by purchasing the stock of the latter.² As a general rule it may be said that any natural person capable of concluding an ordinary contract is competent to buy and sell shares of stock.³ A purchase of shares of stock made by an infant is not absolutely void, but voidable only.⁴ Accordingly, if it be not repudiated by him before attaining majority,⁵ or within a reasonable time thereafter, he will be bound by his contract to his vendor, and will be subject to all the liabilities of a stockholder.⁶ But a company will not be compelled to register a transfer to an infant based upon contract.⁷ Shares of stock may be transferred to a pauper, and if there be no secret trust or reservation, the company may be compelled to permit registration to be made.⁸ The capacity of a married woman to take, hold and transfer shares of stock is governed by the law of her domicile.⁹ Under the English Married Woman's Property Act of 1870, a married woman may, with the consent of her husband, purchase or take paid-up shares of stock, or stock upon which no liability is incurred;¹⁰ and the company is bound to register them in her name, unless it can show a flaw in her title.¹¹ But if the shares be purchased or taken without her husband's consent, he may obtain an order of court requiring them to be turned over to himself.¹² Under this statute, however, a married woman cannot transfer

her stock unless it has been formally set apart as her separate estate.¹³ Yet, if the company has allowed her to make a transfer, it cannot cancel the registration thereof.¹⁴

1 *Vide supra*, § 81.

2 *Commonwealth v. Pennsylvania R. R. Co. et al.*, Court of Common Pleas of Dauphin Co. Pa., SIMONTON, P. J., affirmed by Supreme Court of Pa. Oct. 4, 1886; no opinion delivered.

3 As to sales of stock by insane persons, see *Chew v. Bank of Baltimore*, 14 Md. 299; by partners, see *Quiver v. Marblehead Social Ins. Co.* 10 Mass. 476; *Sargent v. Franklin Ins. Co.* 8 Pick. 90; 19 Am. Dec. 306. *Cf.* *Comstock v. Buchanan*, 57 Barb. 127; *Weikersheim's Case*, Law R. 8 Ch. 831; by joint owners, see *Standing v. Bowring*, 27 Ch. Div. 341; *Slaymaker v. Bank of Gettysburg*, 10 Pa. St. 373; *Comstock v. Buchanan*, 57 Barb. 127; *Garrick v. Taylor*, 3 Law T. N. S. 460; *Hill's Case*, Law R. 20 Eq. 585.

4 *Lumsden's Case*, Law R. 4 Ch. 31.

5 *Newry etc. R'y Co. v. Coombe*, 3 Ex. 565, 578.

6 *Dublin etc. R'y Co. v. Black*, 8 Ex. 181. *Cf.* *Birkenhead etc. R'y Co. v. Pilcher*, 5 Ex. 24.

7 *Regina v. Midland Counties etc. R'y Co.* 15 Ir. R. Com. L. 514.

8 *Regina v. Midland Counties etc. R'y Co.* 15 Ir. Ch. 525.

9 *Hill v. Pine River Bank*, 45 N. H. 300. As to the husband's right to transfer stock standing in the name of his wife, see *Stairwood v. Stairwood*, 17 Mass. 57; *Arnold v. Ruggles*, 1 R. I. 165; *Stamford Bank v. Ferris*, 17 Conn. 259; *Slaymaker v. Bank of Gettysburg*, 10 Pa. St. 373; *Curtis v. Steever*, 36 N. J. 304; *Dow v. Gould etc. Co.* 31 Cal. 623; *Cornell's Case*, 18 Week. Notes Cas. (Pa.) 289; *Wall v. Tomlinson*, 16 Ves. 413; *Wildman v. Wildman*, 9 Ves. 174; *Cochrane v. Chambers*, Amb. 79, note.

10 33 & 34 Vict. ch. 93, § 4.

11 *Regina v. Carnatic R'y Co.* Law R. 8 Q. B. 299.

12 33 & 34 Vict. ch. 93, § 4.

13 *Howard v. Bank of England*, Law R. 19 Eq. 295.

14 *Ward v. Southeastern R'y Co.* 2 El. & E. 812.

§ 332. Of the competency of a corporation to buy its own shares—The English rule.—In England a corporation cannot ordinarily at common law purchase shares of its own stock.¹ The validity of such a transaction is dependent upon “a clear, distinct, undoubted and special” grant of authority by the corporate charter, the deed of settlement, or some enabling statute.² Although the transaction may wear the appearance of a cancella-

tion of the contract of subscription, the courts are inclined, whenever the circumstances will admit it, to regard it as a sale, for the purpose of holding the stockholder liable;³ and so long as the contract of sale remains executory, the corporation may repudiate it.⁴ It cannot, after insolvency, be compelled to register a transfer of shares which it has contracted to take.⁵ Although the company may have the authority to make the purchase, yet if it afterward becomes insolvent, a stockholder who sold his shares to it directly, or indirectly to an agent of the company whom he, or his agent in the sale,⁶ knew to be acting for the company, he will be held to his original liability upon the shares.⁷ Conversely, if neither the vendor, nor his agent, knew that he was selling to an agent of the company, he will be discharged from his liability.⁸ But the directors will stand in the shoes of the person whom they, by buying the shares, may have discharged, and they may be compelled to pay up the remainder of the unpaid portion of the capital which the latter would have had to pay, had he not been discharged.⁹

1 *Hope v. International etc. Soc.* 4 Ch. Div. 327; *In re Marseilles Extension R'y Co.* Law R. 7 Ch. 161; *Zulueta's Claim*, Law R. 5 Ch. 444; *Cross's Case*, 33 Law J. Ch. 533; *Evans v. Coventry*, 25 Law J. Ch. 489, 501; *Ward's Case*, 29 Week. R. 768; *Eyre's Case*, 31 Beav. 177; *Morgan's Case*, 1 De Gex & S. 750; *Ex parte Morgan*, 1 Macn. & G. 225.

2 *Zulueta's Claim*, Law R. 5 Ch. 444. *Cf.* *Cockburn's Case*, 4 De Gex & S. 177. But see *Singer's Case*, Week. Notes (Eng. 1869) 206, where the authority was implied from a grant of power to the directors to enter into any contract that seemed best for the company.

3 *Duke's Case*, 1 Ch. Div. 622; *Teasdale's Case*, Law R. 9 Ch. 54; *Hall's Case*, Law R. 5 Ch. 707, distinguishing *Snell's Case*, Law R. 5 Ch. 22; *Thomas's Case*, Law R. 13 Eq. 437; *Cook on Stock & Stockh.* § 310.

4 *Zulueta's Claim*, Law R. 5 Ch. 444. *Cf.* *Abeles v. Cochran*, 22 Kan. 405; *Great Eastern R'y Co. v. Turner*, 42 Law J. Ch. 83: holding that when the contract has been executed the stock belongs to the corporation, and does not pass to the vendor's assignee in bankruptcy.

5 *Mitchell v. City of Glasgow Bank*, 4 App. Cas. 624.

6 *Richmond's Case*, 3 De Gex & S. 96.

7 *Daniell's Case*, 22 Beav. 43; *Munt's Case*, 22 Beav. 55; *Bennett's Case*, 5 De Gex M. & G. 234; *Walters' Second Case*, 3 De Gex & S. 244; *Richmond's Exrs Case*, 3 De Gex & S. 96.

8 *Nicol's Case*, 3 De Gex & J. 387; *Richmond's Case*, 3 De Gex & S. 96; *Grady's Case*, 1 De Gex, J. & S. 488.

9 *Evans v. Coventry*, 25 Law J. Ch. 469, 501; *Land Credit Co. v. Fermoy*, Law R. 8 Eq. 7; *Ashhurst v. Mason*, Law R. 20 Eq. 225; holding also that the directors are entitled to contribution from each other in such cases.

§ 333: **Of the competency of a corporation to buy its own shares—The American rule.**—In New York it is declared unlawful for any railway company formed under the act of 1850, “to use any of its funds in the purchase of any stock in its own or in any other corporation,”¹ “except so far as the same may be agreed upon in its articles of association.”² In the absence of such statutory or charter restrictions, however, it is the rule in nearly all the American States, with the exception of Kansas, probably alone,³ that a solvent corporation may buy and sell shares of its own stock, receive them in payment of debts, or by way of pledge, gift or bequest.⁴ But the American rule is subject to the restriction that the corporation may not purchase its own shares at such a time and in such a manner as to take away the security upon which the corporate creditors have a right to rely for the payment of their claims;⁵ and corporate creditors who are injured thereby may have the transaction set aside;⁶ especially when the capital stock was impaired,⁷ or the corporation was insolvent at the time of the purchase.⁸ Even though the vendor of stock may have had no actual knowledge of the fact that the capital stock was impaired, and although he sold to an agent whom he did not actually know to be pur-

chasing for the company, yet if the circumstances were such that he might have known these facts, he may be held liable to corporate creditors as a trustee for that part of the capital of the company paid him by way of purchase-money for his shares.⁹ When its own shares are purchased by a corporation the stock is not thereby extinguished nor destroyed, nor is the capital stock necessarily reduced,¹⁰ for the shares may be sold by the company again;¹¹ unless they were purchased with a view to their extinguishment, the effect of the purchase to reduce the capital stock being dependent upon the intention with which it was made.¹² Stock held by the corporation or by a trustee for its benefit cannot be voted upon at corporate meetings, nor is it entitled to draw dividends.¹³

1 N. Y. Laws of 1880, ch. 340, § 2.

2 N. Y. Laws of 1881, ch. 468, § 12.

3 In Kansas the English rule is followed: *German Savings Bank v. Wulfekuhler*, 18 Kan. 60.

4 *State Bank v. Fox*, 3 Blatchf. 431, *Lake Superior Iron Co. v. Dresel*, 80 N. Y. 87, where the legality of a gift to a corporation of shares of its own stock was assumed, *City Bank v. Bruce*, 17 N. Y. 567; *Illinois v. Beale*, 26 Ga. 17, *Hartbridge v. Rockwell*, *Charlton R. M. 2d*, *100 Mass. Navigation Co. v. Dorrison*, 3 Cratt. 19; 44 Am. Dec. 163, where it was held that a corporation may receive shares of its own stock by bequest, *Dupre v. Boston etc. Co.* 114 Mass. 37; *Lealand v. Hayden*, 102 Mass. 5; *Crane v. Babcock*, 81 Mass. 525, 537, 40 Am. Dec. 6; *Furness etc. Bank v. Champlata Transp. Co.* 18 Vt. 131, 139, 8 C. 16 Vt. 35, 43 Am. Dec. 411; 8 C. 13 Vt. 185, 106 Am. Dec. 68, *Early & Lane's Appeal*, 89 Pa. St. 411; *Phy v. Guest*, 44 Pa. St. 160; *Coleman v. Columbia Oil Co.* 11 Pa. St. 74; *Latay v. Bank*, 14 N. J. Ohio Rep. 91, 97; *Taylor v. Miami Exporting Co.* 60 Oh. Rep. 158; 45 Ohio Rep. 102; 29 Am. Dec. 785; *Clapp v. Peterson*, 104 Ill. 26; 40 Am. Dec. 8; *R. R. Co. v. Town of Marshfield*, 81 Ill. 44; *Fraser v. Ritchie*, 8 Bradw. 554; *Iowa Lumber Co. v. Foster*, 43 Iowa 25; *Latson & Barton v. Phelan*, 100 Iowa 337, where the purchase was held void against public policy and *ultra vires*, *Clapp v. Peterson*, 38 Ohio St. 273. Cf. *Thompson on Liability of Stockholders*, §§ 23, 24.

5 *Gillet v. Moody*, 3 N. Y. 479; *Fraser v. Ritchie*, 8 Bradw. 554.

6 *Clapp v. Peterson*, 104 Ill. 26; *Peterson v. Illinois etc. Co.* 8 Bradw. 207.

7 *Crandall v. Lincoln*, 53 Conn. 73, 100.

8 *Currier v. Lebanon State Co.* 56 N. H. 302.

9 *Crandall v. Lincoln*, 53 Conn. 73, 100, 101.

10 *State Bank v. Fox*, 3 Blatchf. 431; *Vail v. Hamilton*, 85 N. Y. 453; *City Bank v. Bruce*, 17 N. Y. 507; *Ex parte Holmes*, 5 Cowen, 428; *Williams v. Savage Manuf. Co.* 3 Md. Ch. 418, 451; *American R'y Frog Co. v. Haven*, 101 Mass. 398; *Commonwealth v. Boston etc. R. R. Co.* (1886) 142 Mass. 146; *State v. Smith*, 48 Vt. 266.

11 *State Bank v. Fox*, 3 Blatchf. 431; *State v. Smith*, 48 Vt. 266.

12 *City Bank v. Bruce*, 17 N. Y. 507; *Williams v. Savage Manuf. Co.* 3 Md. Ch. 413; *State v. Smith*, 48 Vt. 286; *Taylor v. Miami Exporting Co.* 6 Ohio Rep. 176; 22 Am. Dec. 785.

13 *Cook on Stock & Stockh.* § 314.

§ 334. **Transfer by mortgage and pledge.**—The substantial difference between a pledge and a mortgage of stock is that in the case of a pawn or pledge, the possession must pass out of the pawnor, but in the case of a mortgage, it need not.¹ There are but few modern cases in which examples of the mortgage of stock may be found; and transactions which in the earlier decisions were held to be mortgages,² would now be considered pledges.³ In one of the modern cases in which this question was discussed, it was said that there can be no mortgage of shares of stock, for although an instrument purporting to be a mortgage be duly recorded, yet, inasmuch as the recording acts do not apply to conveyances of stock, no constructive notice thereof can be imputed to an innocent purchaser of shares.⁴ In a late case in California, however, may be found an illustration of a mortgage of shares of stock which was held valid and binding between the parties without delivery of possession of the certificates of stock.⁵ It was formerly doubted whether stock could be made the subject of pledge; but it is now well settled that it may be.⁶ The contract of pledge need not be in writing. A mere delivery of the stock certificate indorsed in blank, and a verbal agreement that it shall be held in pledge, without

any registration on the books of the company, is sufficient;⁷ and parol evidence is admissible to show that an assignment of stock absolute upon its face was in fact a pledge.⁸

1 *Huntington v. Mather*, 2 Barb. 533.

2 Such as *Wilson v. Little*, 2 N. Y. 443; 51 Am. Dec. 307; *Huntington v. Mather*, 2 Barb. 533; *Hasbrouck v. Vandervoort*, 4 Sand. 74; *Williamson v. New Jersey etc. R. R. Co.* 26 N. J. Eq. 398.

3 *Mechanics' etc. Association v. Conover*, 14 N. J. Eq. 219; *Cook on Stock & Stockh.* § 464; *Wood's Railway Law*, § 99.

4 *Spaulding v. Paine*, 81 Ky. 416.

5 *Trogear v. Etiwanda Water Co.* (1893) 76 Cal. 637.

6 *Merchants' National Bank v. Hall*, 83 N. Y. 338; *Newton v. Fay*, 93 Mass. 505; *Dayton National Bank v. Merchants' National Bank*, 37 Ohio St. 208, where it is said that "nothing is better settled."

7 *Burgess v. Seligman*, 107 U. S. 20; *Brick v. Brick*, 98 U. S. 514; *Continental National Bank v. Ellet National Bank* 13 Fed. Rep. 25; *New Orleans National Banking Association v. Wiltz*, 10 Fed. Rep. 330; *Wilson v. Little*, 2 N. Y. 443; *McMinnon v. Macy* 51 N. Y. 153; *Van Harscom v. Broadway Bank*, 9 Bow. 532; *Cornock v. Richards*, 3 La. 1; *Merchants' National Bank v. Richards*, 74 Mo. 77; *Pitt v. Johnson*, 33 La. An. 1286; *Blouin v. Liquidators*, 30 La. An. 714; *Newton v. Fay*, 93 Mass. 505; *Pherson v. Railroad Co.* 42 N. H. 424; *Mount Holly etc. Co. v. Ferree*, 17 N. J. Eq. 117; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24; *Finney's Appeal*, 69 Pa. St. 398; *Gins v. Stumph*, 73 Ind. 209; *Baldwin v. Casfield*, 26 Minn. 43.

8 *Newton v. Fay*, 10 Allen, 505.

§ 335. **The rights, duties and liabilities of a pledgee of stock.**—A pledgee of certificates of stock is protected against a sale or further pledge of the same stock by the pledgor, in the same manner that a purchaser of stock certificates is protected against another sale by his vendor; in either case the rights of the holder of the certificate being superior to a transferee without the certificate.¹ Where the pledgee has not been registered, and an execution has been levied upon the stock by a judgment creditor of his pledgor, a person purchasing at the sheriff's sale, having knowledge of the fact that the stock had been hypothecated, will take subject to the rights of the pledgee.² In the

absence of an express agreement to the contrary the pledgee may have the stock registered in his own name,³ or in the name of some other person.⁴ A person to whom shares of corporate stock are assigned as collateral security for a debt, the transfer being duly made on the books of the company, becomes a shareholder, and is entitled to all the rights consequent thereupon.⁵ A registered pledgee of stock may vote upon the stock held by him as collateral security;⁶ but he cannot vote upon the stock contrary to the wishes and interests of the pledgor;⁷ and under certain circumstances equity may compel him to give the pledgor a proxy.⁸ Whether the pledgee has the shares registered in his name or not, he is entitled to receive dividends declared thereon during the continuance of the pledge.⁹ He must, however, account for them upon final settlement with his pledgor.¹⁰ A person holding stock as pledgee is under no obligation to pay calls thereon, although upon failure of payment the shares be subject to forfeiture.¹¹ But it is thoroughly established that one to whom stock has been transferred in pledge or as collateral security for a loan, and who appears on the books of the company as the owner of the stock, is liable as a stockholder for the benefit of creditors.¹²

1 *Maybin v. Kirby*, 4 Rich. Eq. 105; *supra*, § 330.

2 *Weston v. Bear River etc. Co.* 6 Cal. 425; S. C. 5 Cal. 186; 63 Am. Dec. 117; *Wood's Railway Law*, § 99.

3 *Hiatt v. Griswold*, 5 Fed. Rep. 373; *Horton v. Morgan*, 19 N. Y. 170; 75 Am. Dec. 311; *Union etc. Bank v. Farrington*, 13 Lea. 333; *Cormick v. Richardson*, 3 Lea. 1; *Hubbell v. Drexel*, 21 Am. Law Reg. N. S. 452; *Day v. Holmes*, 103 Mass. 306; *Fay v. Gray*, 124 Mass. 500; *In re Angelo*, 5 De Gex & S. 278.

4 *Anderson v. Philadelphia Warehouse Co.* 111 U. S. 479; *Heath v. Griswold*, 5 Fed. Rep. 573; *Day v. Holmes*, 103 Mass. 306; *Taylor on Corporations* (2d ed. 1889), § 794.

5 *Poole v. West Point etc. Assoc* 30 Fed. Rep. 513, 518.

6 *National Bank v. Case*, 99 U. S. 623, 631, where one of the grounds upon which a registered pledgee of stock is held liable for the corporate debts, is stated to be that "after having taken the apparent ownership, and thus become entitled to receive dividends, to vote at elections, and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibilities of a stockholder": *Vail v. Hamilton*, 85 N. Y. 453, 458.

7 *Vowell v. Thompson*, 3 Cranch, 428; *Schofield v. Union Bank*, 2 Cranch, 115; *Lawrence v. Maxwell*, 53 N. Y. 19; *Baldwin v. Canfield*, 26 Minn. 43; *State v. Smith* (1888), 15 Oreg. 98; *Lewis on Stock Brokers*, 120; *Stephens on Joint Stock Companies*, 401.

8 *Vowell v. Thompson*, 3 Cranch, 428.

9 *Herrmann v. Maxwell*, 47 N. Y. Super. Ct. 347; *Hill v. Newichawanick Co.* 48 How. Pr. 427.

10 *Hasbrouck v. Vandervoort*, 4 Sand. 74; *Isaac v. Clarke*, 2 Bulst. 306; *Edwards on Bailments*, 360.

11 *Southwestern R. R. Co. v. Douglas*, 2 Spear (S. C.) 329.

12 *National Bank v. Case*, 99 U. S. 623, 631; *Pullman v. Upton*, 96 U. S. 328; *Roosevelt v. Brown*, 11 N. Y. 148; *Adderly v. Storm*, 6 Hill (N. Y.) 624; *Crease v. Babcock*, 10 Mete. 525; *Holyoke Bank v. Burnham*, 11 Oush. 183; *Magruder v. Colston*, 44 Md. 349; *Wheelock v. Kost*, 77 Ill. 296; *Hale v. Walker*, 31 Iowa, 344.

§ 336. **Whether the pledgee may sell and repledge the stock.** — It has been said that the pledgee cannot sell or even temporarily repledge the stock without being guilty of a conversion.¹ While this may be ordinarily true, yet, under special circumstances, depending somewhat upon the nature of the pledge, and in all cases with the assent of the pledgor, expressed or implied, the property pledged may be used by the pledgee "in any way consistent with the ultimate rights of the pledgor."² A *bona-fide* purchaser or repledgee of the stock, without notice that it was held in pledge, will be protected.³ And where the owner of stock delivers it to his pledgee with a power to transfer it, even the fact that his name appears upon the certificate is not notice of his rights as against a third person taking it for value from the pledgee.⁴

1 *Fay v. Gray*, 124 Mass. 500; *Goss v. Hampton*, 16 Nev. 185; *France v. Clark*, 22 Ch. Div. 830, disapproving a contrary dictum in *Ex parte Sargent*, Law R. 17 Eq. 273.

2 *Lawrence v. Maxwell*, 53 N. Y. 19; *Chamberlain v. Greenleaf*, 4 Abb. N. C. 178. This question will be found discussed in the notes of 21 Am. L. Reg. N. S. 454, with many cases cited *pro* and *con*. See also Story on Bailments, § 324. In the notes to Cook on Stock and Stockh. § 471, many cases in point are directed.

3 *McNeil v. Tenth National Bank*, 46 N. Y. 325; *Cherry v. Frost*, 7 Lea, 1; *Thompson v. Toland*, 48 Cal. 99; *Ex parte Sargent*, Law R. 17 Eq. 273. *Contra*, *Ortigosa v. Brown*, 47 Law J. Ch. 168.

4 *Felt v. Heye*, 23 How. Pr. 359; *Wood's Railway Law*, § 99.

§ 337. **Redemption and forfeiture.**—A person with whom stock certificates have been hypothecated is not bound, upon redemption of the pledge, to return the identical certificates originally deposited with him. It is sufficient that he return an equal amount of stock of the same kind.¹ Upon the failure of the pledgor to redeem the stock, the pledgee has two remedies. The first is by bill in equity seeking a foreclosure.² This is his appropriate remedy where the pledge was made without a written transfer of the certificate;³ or where it was made as security for the performance of a contract, and the damages are unliquidated.⁴ The second remedy is by selling the stock at public auction,⁵ after giving personal notice to the pledgor of the time and place of sale.⁶ A sale on the stock exchange is not considered a public sale; for none but members of the association have the privilege of bidding there.⁷ A private sale is not allowable.⁸ But in case the sale has been private, the pledgor, by his conduct, may be estopped to object to its validity.⁹ If the pledgee himself becomes the purchaser at the sale, his purchase is voidable at the election of the pledgor.¹⁰

1 *Horton v. Morgan*, 19 N. Y. 170; 75 Am. Dec. 311; *Taylor v. Ketchum*, 35 How. Pr. 289; *Dykers v. Allen*, 7 Hill, 497; *Price v. Grover*, 40 Md. 102; *Gilpin v. Howell*, 5 Pa. St. 41; 45 Am. Dec. 720; *Noyes v. Spaulding*, 27 Vt. 420; *Thompson v. Toland*, 48 Cal. 99; *Atkins v. Gamble*, 42 Cal. 86; *Hardenburgh v. Bacon*, 33 Cal. 356; *Boylan v. Huguet*, 8 Nev. 345; *Hubbell v. Drexel*, 21 Am. Law Reg. N. S. 452; *Langton v. Waite*, Law R. 6 Eq. 165.

2 *Vaupell v. Woodward*, 2 Sand. Ch. 143.

3 *Johnson v. Dexter*, 2 McArthur, 530; *Merchants' National Bank v. Hall*, 83 N. Y. 338; *Briggs v. Oliver*, 68 N. Y. 336; *Blouin v. Liquidators*, 30 La. An. 714; *Robinson v. Hurley*, 11 Iowa, 410; 79 Am. Dec. 497.

4 *Robinson v. Hurley*, 11 Iowa, 410; 79 Am. Dec. 449.

5 *Ogden v. Lathrop*, 65 N. Y. 158; *Conyngham's Appeal*, 57 Pa. St. 474.

6 *Markham v. Jaudon*, 41 N. Y. 235, 243, holding also that the time and place must be reasonable; *Bryan v. Baldwin*, 52 N. Y. 234, holding that the notice must be personal; *Lewis v. Graham*, 4 Abb. Pr. 106, that newspaper advertisement is not sufficient notice; *Stevens v. Hurlbut Bank*, 31 Conn. 146, holding that express power to sell in a certain event is not a waiver of notice.

7 *Brass v. Worth*, 40 Barb. 648; *Rankins v. McCullough*, 12 Barb. 103; *Willoughby v. Comstock*, 3 Hill, 389.

8 *Willoughby v. Comstock*, 3 Hill, 389; *Castello v. City Bank*, 1 Leg. Obs. 25. But see *Bryson v. Raynor*, 25 Md. 424, holding that an express power to sell authorizes a private sale, or a sale at a broker's board.

9 *Willoughby v. Comstock*, 3 Hill, 339.

10 *Bryan v. Baldwin*, 52 N. Y. 232; *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 242.

§ 338. **Transfer by sale—Brokers' contracts.**—Contracts for the sale of stock are usually made through the medium of brokers. Ordinarily any person capable of making a contract may act as a broker.¹ But a broker dealing in stocks for a customer incompetent to contract, becomes personally liable.² The formalities and method of completing a stock-broker's contract are governed largely by the usages of the stock exchange.³ This "has been held in a great number of cases."⁴ But it is well settled that no custom among brokers can deprive parties of rights which the law gives them unless these rights be waived by agreement.⁵ In England, where transfers of stock must be by deed, in the case of sales upon the stock exchange, the practice is for the broker to sell to a jobber, and, after several sub-purchases, the name of the ultimate purchaser is passed to the vendor. If the vendor accepts the name and executes a deed of transfer which is accepted by the transferree, the contract

between the ultimate purchaser and vendor is complete, notwithstanding the intermediate sales at varying prices, and may be specifically enforced, or damages may be recovered for its breach.⁶ It would seem to be doubtful whether the vendor could refuse to accept a name passed by the jobber where it represents a real person capable of contracting.⁷ An acceptance of the transfer by the purchaser's brokers is sufficient to bind the purchaser.⁸ The purchasing jobber is discharged from liability as soon as the name of a person competent to accept the shares has been furnished to the vendor and a transfer has been executed by him and accepted by the transferee.⁹ It is immaterial that the transferee is only a nominee for the purchaser or a man of straw, if he has in fact been accepted by the vendor.¹⁰ If, however, the jobber guaranty registration, he is not discharged until the transferees have been accepted by the company and duly registered.¹¹

1 Cook on Stock & Stockh. § 446. But see *First National Bank v. Hock*, 20 Alb. Law J. 215, where it was held that a national bank cannot act in that capacity.

2 *Ruchizky v. De Haven*, 97 Pa. St. 202; *Heritage v. Paine*, 2 Ch. Div. 594; *S. O. 34 Law T.* 947; *Nicholls v. Merry*, Law R. 7 H. L. 580; *Marted v. Paine*, Law R. 4 Ex. 81; *Dent v. Nickalls*, 29 Law J. Ch. 536.

3 Cook on Stock & Stockh. § 453.

4 *Biederman v. Stone*, Law R. 2 Com. P. 504.

5 *Robinson v. Norris*, 51 How. Pr. 442.

6 *Browne & Theobald's Railway Law*, 70.

7 *Browne & Theobald's Railway Law*, 71; *Marted v. Paine*, Law R. 6 Ex. 132. *Cf. Allen v. Graves*, Law R. 5 Q. B. 478.

8 *Loring v. Davis*, 32 Ch. Div. 625; *Sheppard v. Murphy*, Ir. R. 2 Eq. 544; *Bowring v. Shepherd*, Law R. 6 Q. B. 309.

9 *Grissell v. Bristowe*, Law R. 4 Com. P. 37; *Coles v. Bristowe*, 4 Ch. 3.

10 *Marted v. Paine*, Law R. 6 Ex. 132.

11 *Cruse v. Paine*, 4 Ch. 441.

§ 339. The same subject, continued.—The broker must obey the specific orders of his customer,¹

and in general he must not go beyond the scope of those directions. But an order to buy shares of stock carries with it implied authority to do all that is needful to complete the bargain.² Thus, where the vendor paid a call in order to enable her to make a transfer of the shares, and the broker being under the rules of the stock exchange personally responsible to her for the amount, paid it, he was allowed to recover from his customer.³ The broker must act in good faith, giving his customer the advantage of the transaction as actually made.⁴ And, while he will be allowed a reasonable time for the execution of orders, he must act with promptness.⁵ He cannot purchase from nor sell to himself, in behalf of his customer.⁶ A person who employs a broker to speculate in shares for him on the stock exchange, the intention being not to buy them, but only to pay or receive the difference between the contract and market price on the day of final settlement, is bound to indemnify the broker against sums which he is compelled to pay.⁷

1 *Clarke v. Meigs*, 10 Bosw.; *Parsons v. Martin*, 77 Mass. 111. But he may correct a palpable error in the order given him: *Luffman v. Hay*, 13 N. Y. Week. Dig. 324; *Cook on Stock & Stockh.* § 448.

2 *Bayley v. Wilkins*, 7 Com. B. 886.

3 *Bayley v. Wilkins*, 7 Com. B. 886.

4 *Levy v. Loeb*, 85 N. Y. 385; S. C. 89 N. Y. 386; *Voris v. McCready*, 16 How. Pr. 87; *Dey v. Holmes*, 103 Mass. 306; *Pickering v. Demeritt*, 100 Mass. 416; *Cook on Stock & Stockh.* § 449.

5 *Fletcher v. Marshall*, 15 Mees. & W. 755.

6 *Marye v. Strouse*, 5 Fed. Rep. 483; *Conkey v. Bond*, 36 N. Y. 427; *Tausig v. Hart*, 58 N. Y. 425; *Robinson v. Mollett*, Law R. 7 H. L. 802; *Brookman v. Rothschild*, 3 Sim. 153.

7 *Thacker v. Hardy*, 4 Q. B. Div. 685; *x parte Rogers*, 15 Ch. Div. 207.

§ 340. The contract of sale—Whether within the statute of frauds.—It is well settled, both in England and America, that shares in the capital

stock of companies, even of those holding real estate, are personal property;¹ and, accordingly, sales of stock do not come within the meaning of the fourth section of the statute of frauds,² relating to conveyances of interests in land.³ Nor in England are sales of stock held to be within the meaning of the seventeenth section of the statute requiring acceptance of part of the "goods, wares or merchandise," or the giving of something in earnest to bind the bargain, or in part payment, or the making of some note or memorandum in writing, signed by the parties to be charged.⁴ In America, however, contracts for the sale of stock are held to fall clearly within that part of the seventeenth section relating to "goods, wares and merchandise."⁵ But a broker may make and sign the memorandum as agent for both parties, and it will be a sufficient signing by the party to be charged.⁶

1 *Vide supra*, § 62.

2 29 Car. II, ch. 3.

3 *Ashworth v. Munn*, 14 Ch. Div. 363; *Walker v. Bartlett*, 18 Com. B. 845; *Powell v. Jessop*, 18 Com. B. 336; *Watson v. Spratley*, 10 Ex. 222; *Smith on Contracts* (6th Eng. ed.), 129. *Cf. Baxter v. Brown*, 7 Macn. & G. 198.

4 *Duncuft v. Albrecht*, 12 Sim. 189, 199; *Hibblewhite v. McMorine*, 6 Mees. & W. 201, 214; *Heseltine v. Liggers*, 1 Ex. 856; *Tempest v. Kilner*, 3 Com. B. 249; *Cheale v. Kenwood*, 3 De Gex & J. 27; *Humble v. Mitchell*, 11 Ad. & E. 205; *Smith on Contracts* (6th Eng. ed.), 129.

5 *Baltzen v. Nicolay*, 53 N. Y. 467; *Sberman v. Tradesman's National Bank*, 16 N. Y. Week. Dig. 522; *Hagar v. King*, 33 Barb. 230, as to railway bonds; *Johnson v. Mulry*, 4 Rob. (N. Y.) 401; *Fine v. Hornaby*, 2 Mo. App. 61; *Colvin v. Williams*, 3 Har. & J. 38; 5 Am. Dec. 417; *Tisdale v. Harris*, 20 Pick. 9; *North v. Forrest*, 15 Conn. 400; *Pray v. Mitchell*, 60 Me. 430; *Mayer v. Child*, 47 Cal. 142. *Cf. Brownson v. Chapman*, 63 N. Y. 625; *Vaupell v. Woodward*, 2 Sand. Ch. 143; *Mason v. Decker*, 72 N. Y. 595; *Reed on Statute of Frauds*, § 234. *Contra*: There are some remarks to the contrary spoken *obiter* in *Vawter v. Griffin*, 40 Ind. 593, 602. But the statute does not apply to stock in a company not yet incorporated: *Gadsden v. Lance*, 1 McMull. Eq. 87; 37 Am. Dec. 548; *Boardman v. Cutter*, 128 Mass. 388; *Green v. Brookins*, 23 Mich. 48, 54. Nor as between two persons, one of whom buys stock in his own name for the benefit of both: *Storer v. Flack*, 41 Barb. 162. Nor as between persons associated as partners for the purpose of buying stock: *Tomlinson v. Miller*, 7 Abb. Pr. N. S. 364; *Cook on Stock & Stockh.* § 339.

Colvin v. Williams, 3 Har. & J. 38; 5 Am. Dec. 417.

§ 341. **The same subject, continued.**—Where part payment takes the place of the memorandum in writing, it is not essential that it be made at the time; the contract will be upheld although it be made thereafter;¹ nor is it required that this payment be made in money. Property or services will be a sufficient payment.² It has even been held that the part payment may consist of such services as the furnishing of reliable information.³ The further provision of the seventeenth section of the statute of frauds,⁴ relating to promises to answer for the debt, default or miscarriage of another, does not apply to the relation between a broker and his client;⁵ nor to a guaranty by a vendor that a certain dividend will be paid upon the stock.⁶ An agreement by the vendor of stock to take it back at any time is not within the statute of frauds, being a part of the executed sale.⁷ When the statute is relied upon it must be pleaded,⁸ and be pleaded expressly. It is not sufficient to allege that the contract "was void in law, and not binding upon" the defendant.⁹

¹ Thompson v. Alger, 12 Metc. 428.

² Eastern R. R. Co. v. Benedict, 10 Gray, 212; White v. Drew, 56 How. Pr. 53.

³ White v. Drew, 56 How. Pr. 53.

⁴ 29 Car. II, ch. 3.

⁵ Rogers v. Gould, 6 Hun, 229; Genin v. Isaacsen, 6 N. Y. Leg. Obs. 213.

⁶ Moorehouse v. Crangle, 36 Ohio St. 130; Cook on Stock & Stockh. § 340.

⁷ Fitzpatrick v. Woodruff, 96 N. Y. 561; Thorndike v. Locke, 98 Mass. 340; Fay v. Wheeler, 44 Vt. 292; Cook on Stock & Stockh. § 330. Cf. Stewart v. Couty, 8 Mees. & W. 160.

Porter v. Wormser, 94 N. Y. 431.

Vaupell v. Woodward, 2 Sand. Ch. 143.

§ 342. **A seal unnecessary.**—A seal is not necessary to a transfer of stock,¹ unless required

under the by-laws² or charter of the corporation, as is often the case in the charters of English railway companies.³ Otherwise, although it be affixed, it does not impart to the writing the character of a contract under seal.⁴

1 Quiner v. Marblehead Social Ins. Co. 10 Mass. 476; Atkinson v. Atkinson, 8 Allen, 15; Walker v. Bartlett, 36 Eng. Law & Eq. 369; In re Teas Bistle Co. 33 Law T. N. S. 834.

2 Bishop v. Globe Co. 135 Mass. 132.

3 Cook on Stock & Stockh. § 377.

4 McNiel v. Tenth National Bank, 46 N. Y. 325; Commercial Bank v. Kortright, 22 Wind. 348; Bridgeport Bank v. New York etc. R. R. Co. 30 Conn. 231, 247; German etc. Assoc. v. Seidmeyer, 50 Pa. St. 67.

§ 343. Of the consideration for the contract—
Warranty of title.—A reciprocal agreement to transfer and accept a transfer of shares is not a *nudum pactum*; for the mutual promises constitute good considerations for each other, although nothing has been paid on the shares.¹ It is a general rule of law that a party selling personal property of which he is in possession, warrants by implication his title to the thing sold. This doctrine applies to the sale of such *choses in action* as shares of stock. The certificate is evidence of ownership, and if the certificate is forged, or the holder is not a *bona-fide* holder, and from the circumstances of the case transfers no valid claim as against the corporation, he will be liable to his vendee upon this implied warranty of title.² A transferee of stock may rely upon the books of the company as evidence of the ownership of his vendor, and if the stock prove to be spurious, the corporation cannot plead “that its officer had no authority to keep any but correct books.”³ No implied warranty attends a sale of
 certificates of corporate stock, that the corporation,

which issued them, is a corporation *de jure*, it being sufficient as to any implied warranty, if they were issued by a corporation *de facto*.⁴ A vendor's agreement to deliver stock free from all incumbrances does not refer to incumbrances against the corporation.⁵

1 Taylor on Corporations (2d ed. 1839), § 789. See, also, *Cheale v. Benward*, 3 De Gex & J. 27.

2 Taylor on Corporations (2d ed. 1839), § 793.

3 *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, 76, 77; *Gray v. Portland Bank*, 3 Mass. 34; 3 Am. Dec. 156.

4 *Harter v. Elzoth*, 111 Ind. 159.

5 *Williams v. Hanna*, 40 Ind. 535.

§ 344. **Tender.**—A tender of the certificates of stock, duly indorsed, with an assignment by the vendor to the vendee, together with a power of attorney authorizing the vendee to procure the registration of the transfer, is a sufficient performance of a contract for the sale and delivery of stock,¹ unless the vendee insists upon the vendor himself procuring the registration to be made.² Mere delivery, without indorsement or power of attorney, may constitute an equitable assignment and act as an estoppel against the legal owner and creditor, claiming through him.³

1 *Munn v. Barnum*, 24 Barb. 283; *Merchants' National Bank v. Richards*, 6 Mo. App. 454; *Noyes v. Spaulding*, 27 Vt. 420; *Eastman v. Fiske*, 9 N. H. 182; *Bruce v. Smith*, 44 Ind. 1. *Cf.* *Moore v. Hudson River R. R. Co.* 12 Barb. 156. A usual form of assignment and power of attorney may be found in *McNeill v. Tenth National Bank*, 46 N. Y. 325, 326.

2 *White v. Salisbury*, 33 Mo. 150.

3 *Fraser v. Charleston*, 11 S. C. 496, *obiter*. See also *Burrall v. Bushwick R. R. Co.* 75 N. Y. 211. As for example, in case of *donatio causa mortis*: *Walsh v. Sexton*, 55 Barb. 251; *Allerton v. Lang*, 10 Bosw. 332.

345. Assignment in blank.—When stock certificates are assigned in blank, that is, indorsed with

an assignment and with a power of attorney to have the transfer registered, signed by the transferer, any holder may fill the blank with his own name as transferee, and with either his own name or that of some agent as attorney to make the registry.¹ "The filling up is but the execution of an authority clearly conveyed, is lawful in itself, and convenient to all parties, as it avoids the necessity of needlessly multiplying transfers upon the books."² The power of attorney is not limited to the person to whom it may have been first delivered, but inures to the benefit of each *bona-fide* holder into whose hands the certificate may pass, each successive holder having the right to fill up the blanks and execute the power, or cause it to be executed, whenever the protection of his own interests may require.³ A power of attorney to register a transfer of stock is not revoked by the death of the person giving it.⁴

1 *Matthews v. Massachusetts National Bank*, 1 Holmes, 396; *Cutting v. Damerel*, 88 N. Y. 410; *Holbrook v. New Jersey Zinc Co.* 57 N. Y. 616, 623, where it is said that "these points are too well settled to need discussion;" *Kortright v. Buffalo etc. Bank*, 20 Wend. 343; *Bridgeport Bank v. New York etc. R. R. Co.* 3 Conn. 231; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24; *Pennsylvania R. R. Co's Appeal*, 86 Pa. St. 80; *Walker v. Detroit Transit R'y Co.* 47 Mich. 338; *Ortigosa v. Brown*, 47 Law J. Ch. 16.; *Ex parte Sargent*, Law R. 17 Eq. 273; *In re Barned's Banking Co.* Law R. 3 Ch. 105.

2 *Kortright v. Buffalo etc. Bank*, 20 Wend. 91, affirmed in 22 Wend. 343.

3 *Leavitt v. Fisher*, 4 Duer, 1, 20.

4 *Leavitt v. Fisher*, 4 Duer, 1, 20.

§ 346. **Assignment by deed—The English methods.**—It is provided by the Companies' Clauses Act of 1845, that every transfer of shares shall be by deed, duly stamped, in which the consideration shall be truly stated.¹ The form of the deed is prescribed by the statute, and it is held that deeds of

transfer should be in the statutory form, as the company will not be bound to register a deed materially differing therefrom.³ A deed of transfer in which the name of the transferee is left blank and is afterwards filled up by an agent is void as a deed.³ But where a transferee has signed a deed of transfer and procured himself to be registered, he cannot dispute his liability to the company by reason of the transferrer having executed the deed in blank.⁴ It is sometimes said to be the duty of the vendor,⁵ sometimes of the vendee,⁶ to furnish the necessary deed. It seems to depend largely, however, upon the custom of the market in which the sale is made.⁷ In England it is customary before the passing of an act of Parliament creating the railway, to issue letters of allotment and scrip certificates entitling the bearer to claim shares in the undertaking.⁸ These scrip certificates are, it would seem, transferable by delivery.⁹

1 8 Vict. ch. 16, § 14.

2 *Regina v. General Cemetery Co.* 6 El. & B. 415.

3 *Colonial Bank*, 35 Ch. Div. 36; *Hibblewhite v. McMorine*, 6 Mees. & W. 200; *Societe Generale de Paris v. Walker*, 11 App. Cas. 20; *Hare v. Waring*, 3 Mees. & W. 362.

4 *Sheffield etc. R. R. Co. v. Woodcock*, 7 Mees. & W. 574; *Straffon's Executor's Case*, 1 De Gex, M. & G. 576. In re *Barned's Banking Co.* 16 Law T. N. S. 511; S. C. 3 Ch. 105.

5 *Stephens v. De Medina*, 4 Q. B. 422; *Bowlby v. Bell*, 3 Com. B. 234, 294; *Browne & Theobald's Railway Law*, 71.

6 *Shaw v. Rowley*, 16 Mees. & W. 810.

7 *Cook on Stock & Stockh.* § 334.

8 *Browne & Theobald's Railway Law*, 65.

9 *Browne & Theobald's Railway Law*, 66, citing *Rumball v. Metropolitan Bank*, 2 Q. B. 194. As to the status of unregistered transferees of these certificates, see *Newry etc R'y Co. v. Edmunds*, 2 Ex. 118; S. C. 17 Law J. Ex. 102, where it is held that they are not liable for calls; and *Jackson v. Cocker*, 2 Rob. C. 368; S. C. 4 Beav. 59, in which it appears that the transferee of these certificates cannot, in the absence of a special agreement, be compelled by his transferrer to place himself upon the register.

§ 347. **Acceptance.**—A person cannot become the assignee of stock nor be subject to the liabilities thereto attaching without his own knowledge and consent.¹ Thus, it is held that an original stockholder, who has been compelled to pay calls upon stock after having assigned it, is not entitled to be subrogated to the rights of the corporation against the delinquent assignee without clear proof of his having accepted the transfer.² And the record of the transfer upon the books of the company is not sufficient evidence of acceptance by the transferee to render him liable to the transferor for calls and assessments paid after the assignment was made.³ Nor are the blotter of the company's treasurer and the stubs of his check-book, containing entries to the effect that the assignee had paid calls on the shares, admissible to prove an acceptance of the transfer, the defendant being a stranger to the corporation.⁴ It is not a sufficient cause for declining a tender of the certificates that the corporation has issued stock at a discount, nor that it has mortgaged its property.⁵ If the stock has been attached, the vendee may decline to accept the certificate.⁶

1 *Tripp v. Appleman*, 35 Fed. Rep. 19.

2 *Tripp v. Appleman*, 35 Fed. Rep. 19.

3 *Tripp v. Appleman*, 35 Fed. Rep. 19.

4 *Tripp v. Appleman*, 35 Fed. Rep. 19.

5 *Noyes v. Spaulding*, 27 Vt. 420; *Cook on Stock & Stockh.* § 334.

6 *Eastman v. Flske*, 9 N. H. 182.

§ 348. **Delivery.**—A contract for the sale of stock may be valid and enforceable without delivery; and although no future day be agreed upon for delivery and payment, the character of the contract

is not thereby altered, the law implying that it shall "be performed immediately, or, perhaps, within a reasonable time." Although such a contract does not pass any title to the stock, it is nevertheless valid, and may be enforced by either party, provided he has not himself been in default.¹ What constitutes a reasonable time is to be determined by usage.²

1 *Bruce v. Smith*, 44 Ind. 1. *Acc. Kerchuer v. Gettys*, 18 S. C. 521; *Cheale v. Kenward*, 3 De Gex & J. 27.

2 *Stewart v. Cauty*, 8 Mees. & W. 160, holding seven days to be a reasonable time.

§ 349. Specific performance of the contract—When equity will enforce.—It is frequently said that a court of equity will not enforce specific performance of a contract for the sale of shares of stock.¹ This rule is limited, however, to cases where an action for damages would furnish a complete and satisfactory remedy.² But whenever, from the scarcity of the shares, or other reasons, the vendee could not, taking the money which would be awarded him as damages, go into the market and buy similar shares, a specific performance may be decreed;³ provided the contract be not in other respects unconscionable or against public policy.⁴ Thus it is said that "there is no doubt that a bill will lie for a specific performance of an agreement to transfer railway shares,"⁵ for "railway shares are limited in number, . . . and are not always to be had in the market."⁶

1 *Ross v. Union Pacific R'y Co.* 1 Woolw. 26, 32; *Duncuft v. Albrecht*, 12 Sim. 198; *Buxton v. Lister*, 3 Atk. 383; *Colt v. Netterville*, 2 P. Wms. 304; *Ouddee v. Rutter*, 1 P. Wms. 570.

2 *Turner v. May*, 32 Law T. N. S. 55; *Parish v. Parish*, 32 Beav. 207; *Poole v. Middleton*, 23 Beav. 616; *Duncuft v. Albrecht*, 12 Sim. 189. *Con-*

tra: The expressions to the contrary in *Ross v. Union Pacific R'y Co.* 1 Woolw. 26, 32, were spoken *obiter*.

3 *Johnson v. Brooks*, 93 N. Y. 337; *White v. Schuyler*, 1 Abb. Pr. N. S. 300; S. C. 31 How. Pr. 38; *Todd v. Taft*, 7 Allen, 371; *Cheale v. Kinwood*, 3 De Gex & J. 27; *Taylor on Corporations*, § 790. *Cf.* *Chater v. San Francisco etc. Co.* 10 Cal. 219; *Cushman v. Thayer Manuf. Co.* 76 N. Y. 368.

4 *Mississippi etc. R. R. Co. v. Cromwell*, 91 U. S. 643.

5 *Cheale v. Kenward*, 3 De Gex & J. 27, citing *Duncuft v. Albrecht*, 12 Sim. 189. *Acc.* *Todd v. Taft*, 89 Mass. 371; *Baldwin v. Commonwealth*, 11 Bush, 417; *Ash v. Johnson*, 2 Jones Eq. 149.

6 *Duncuft v. Albrecht*, 12 Sim. 189.

§ 350. The same subject, continued.—If the vendor does not own stock of the kind which he has undertaken to transfer,¹ or not enough to meet the requirements of his contract, the court will not decree specific performance except as to the number of shares which he already owns.² Nor will a court of equity enforce a transfer or delivery of particular shares, all being alike.³ The purchaser is not the only party to the contract who is entitled to its specific performance. When any liability is attached to the ownership of the shares, the vender may compel the purchaser in equity to register himself as their owner.⁴ If the agreement for the transfer of shares of stock forms part of a contract that equity will specifically enforce, as, for example, a contract for the sale of land, the court will decree a specific performance of the one in the course of enforcing the other.⁵ Especially will equity decree a specific performance in the course of enforcing a trust.⁶ On the other hand, if the agreement be part of a contract which equity cannot, or will not, specifically enforce, neither will the court require a specific transfer of the stock;⁷ except as above stated, where an award of damages would not be an adequate remedy. When a court of equity has declined to require the agreement to be specifically

performed, it will in the same action proceed to give judgment for damages for the breach of the contract.⁸

1 *Columbine v. Chichester*, 2 Phill. Ch. 27.

2 *Turner v. May*, 32 Law T. N. S. 53; *Cook on Stock & Stockh.* § 338.

3 *Hubble v. Drexel*, 21 Am. Law Reg. N. S. 452; *Hardenberg v. Bacon*, 33 Cal. 355; *Taylor on Corporations*, § 790.

4 *Paine v. Hutchinson*, Law R. 3 Eq. 257; S. C. Law R. 3 Ch. 388; *Walker v. Bartlett*, 2 Jur. N. S. 643; S. C. 18 Com. B. 845; *Taylor on Corporations*, § 791.

5 *Bissell v. Farmers' etc. Bank*, 5 McLean, 495; *Leach v. Fobes*, 11 Gray (77 Mass.), 506; 71 Am. Dec. 732; *Taylor on Corporations* (2nd ed. 1889), § 790.

6 *Draper v. Stone*, 71 Me. 175; *Coles v. Whitman*, 10 Conn. 121; *Taylor on Corporations* (2nd ed. 1889), § 730.

7 *Taylor on Corporations* (2nd ed. 1889), § 790, citing *Ross v. Union Pacific*, 1 Woolw. 26; *Danforth v. Philadelphia etc. R'y Co.* 30 N. J. Eq. 12; *Fallon v. Railroad Co.* 1 Dill. 121.

8 *Austin v. Gillespie*, 1 Jones Eq. 261; *Woson v. Fanno*, 129 Mass. 405.

§ 351. **Defenses to actions to enforce a contract to transfer.**—It is no defense to an action upon a contract for the sale of stock that, at the time it was entered into, the company was insolvent;¹ nor that the directors have committed an *ultra vires* act in issuing stock at a discount;² nor that, by reason of a winding-up, registration could not be effected,³ unless, of course, the question of fraud is involved.⁴

1 *Rudge v. Bowman*, Law R. 3 Q. B. 688; *Crubb v. Miller*, 19 Week. R. 519.

2 *Faulkner v. Hebard*, 26 Vt. 452.

3 *Crubb v. Miller*, 19 Week. R. 519.

4 *Gordon v. Parker*, 10 La. Rep. 56.

§ 352. **Of fraud as affecting the contract to transfer—Misrepresentations.**—There is little difference in the principles of law governing fraud as affecting sales of stock, from fraud as affecting subscriptions for stock.¹ Accordingly, as in the case of

fraud inducing the original subscription, so in the case of sales of stock, the contract will be fraudulent if the first party, or his authorized agent,² either directly or indirectly,³ makes representations which he knows to be false, or does not know to be true,⁴ or conceals the truth, wholly or in part,⁵ with respect to *material*⁶ matters of *fact*—fact as distinguished from opinion,⁷ and as distinguished from matters of law⁸—which the second party does not know, or has not the means of knowing, as well as the first,⁹ for the purpose,¹⁰ and with the result of influencing a sale or purchase, when it is reasonable to suppose that had the second party known the true state of affairs, he would not have entered into the contract.¹¹ If any of these elements of fraud be not satisfactorily proven, an action for deceit will not lie; “for the rules of law require a reasonable degree of certainty as to each requisite necessary to constitute the cause of action, viz., representations, falsity, *scienter*, deception and injury.”¹²

1 Cook on Stock & Stockh. § 349.

2 *Vide supra*, § 132. But if the agent be not authorized to make the warranty, action will not lie for breach thereof: *Smith v. Tracy*, 36 N. Y. 78.

3 Indirectly, by inducing the employees of the company to make false memoranda, whereby the affairs of the company upon examination of its books appear in a better condition than they are in fact: *Hagar v. Thompson*, 1 Black, 80.

4 *Vide supra*, § 134; *Wakeman v. Dalley*, 51 N. Y. 27; *Nelson v. Luling*, 62 N. Y. 645.

5 *Vide supra*, § 134. “It is said that the prospectus is true as far as it goes; but half a truth will sometimes amount to a real falsehood.” *Peck v. Gurney*, Law R. 6 H. L. 377.

6 *Vide supra*, § 138. “Of material facts which necessarily affect the value of the shares”: *Schenwenck v. Naylor*, 102 U. S. 638. The following representations have been held material, and if false, sufficient to render the contract void: That the capital stock of the company has all been paid in, *Cross v. Sackett*, 2 Bosw. 617; *contra*, *Nelson v. Luling*, 62 N. Y. 645; *cf.* *Colt v. Woollaston*, 2 P. Wms. 154; that the shares are fully paid up, *Sturges v. Stetson*, 1 Biss. 246; *Fosdick v. Sturges*, 1 Biss. 255; *cf.* *Seaman v. Law*, 4 Bosw. 337; that the property of the company was free from incumbrances, *Southwestern R. R. Co. v. Papot*, 67 Ga. 775; that the company

was prosperous, when large overissues of stock had been made, *Caylaux v. Mali*, 25 Barb. 578; that the company would guaranty certain dividends, *Gerhart v. Bates*, 20 Eng. Law & Eq. 129; that the stock is good property or investment and is about to make a dividend, *Lawton v. Kittredge*, 30 N. H. 500; that certain persons were owners of stock in the company, *Miller v. Barber*, 66 N. Y. 558. See further, as to what misrepresentations are material, *Bradley v. Pool*, 98 Mass. 169.

7 *Vide supra*, § 136.

8 *Vide supra*, § 137.

9 *Vide supra*, § 135. When a representation is made of a fact that has nothing to do with opinion, and is peculiarly within the knowledge of the person making it, the one receiving it has the absolute right to rely upon its truthfulness, though the means of ascertaining its falsity were fully open to him: *Gammill v. Johnson*, Sup. Ct. Ark., Oct. 9, 1886.

10 *Vide supra*, § 131. *Nelson v. Luling*, 4 N. Y. Sup. Ct. 544; affirmed in 62 N. Y. 645. The intent to deceive must be proven: *Bellaires v. Tucker*, 13 Q. B. 563.

11 *Schenwenck v. Naylor*, 102 N. Y. 638; *Southwestern R. R. Co. v. Papot*, 67 Ga. 775, 692. But the fraud need not have been the sole inducement to the contract: *Morton v. Skiddy*, 62 N. Y. 319, 398. *Vide supra*, §§ 130, 131.

12 *Arthur v. Griswold*, 55 N. Y. 400, 410; *Arkwright v. Newbold*, 17 Ch. Div. 301.

§ 353. **The same subject, continued—Misrepresentations in reports and prospectuses.**—Where the vendor is innocent of the fraud perpetrated by corporate officers, equity cannot set the transaction aside.¹ The vendee's only remedy in that case is against the parties guilty of the fraud. The officials of the corporation are liable to the vendee of stock, for material misrepresentations contained in a report to the stockholders, or in a prospectus to the public issued for the purpose of inducing persons to subscribe to the capital stock, although there is no privity between them and a person purchasing the shares from a stockholder.² In England, however, the rule only applies with respect to reports to the stockholders.³ Accordingly, in that country the purchaser of shares in the market, upon the faith of a prospectus which he has not received from those who are answerable for it, cannot, by action upon

it, so connect himself with them as to render them liable to him for the misrepresentations contained in it, as if it had been addressed personally to himself.⁴ The mere fact that a person is a member of the board of directors is not in itself sufficient to render him liable for the frauds and misrepresentations of the active managers of a corporation. Some knowledge of and participation in the act claimed to be fraudulent must be brought home to the person charged.⁵ A director is not liable for false representations to which his name is attached, of which he was ignorant, as on the printed business card of the company.⁶ On the other hand officers of the company supplying the directors with detailed statements which they know to be false and are to be used in a fraudulent report, are liable for assisting in the fraud, although the report be signed only by the directors.⁷

1 *Moffat v. Winslow*, 7 Paige, 124.

2 *Cross v. Sackett*, 2 Bosw. 617; S. C. 6 Abb. Pr. 247; S. C. 16 How. Pr. 62; *Morgan v. Skiddy*, 62 N. Y. 319.

3 *Gerhard v. Bates*, 2 El. & B. 476; S. C. 20 Eng. Law & Eq. 129; *Davidson v. Tulloch*, 6 Jur. N. S. 543; S. C. 3 Macq. 783. Not only those officials who sign the report, but all who assist in supplying the detailed statements knowing them to be false, are liable: *Cullen v. Thompson*, 6 Law T. N. S. 870.

4 *Peek v. Gurney*, Law R. 6 H. L. 377, overruling *Seymour v. Bagshaw*, 18 Com. B. 903, and *Bedford v. Bagshaw*, 4 Hurl. & N. 538, and distinguishing *Scott v. Dixon*, 29 Law J. Eq. 62, and *Gerhard v. Bates*, 2 El. & B. 476. See, also, *Cargill v. Bower*, 10 Ch. Div. 502. But see *Bellairs v. Tucker*, 13 Q. B. 563, where misrepresentations contained in a prospectus and those in a report to stockholders are not distinguished.

5 *Arthur v. Griswold*, 53 N. Y. 400; *Morgan v. Skiddy*, 62 N. Y. 319.

6 *Wakeman v. Dalley*, 51 N. Y. 27.

7 *Cullen v. Thompson*, 62 Law T. N. S. 870.

§ 354. The same subject, continued—Circumstances from which fraud will not be presumed.—A contract for the sale of stock cannot be set aside as fraudulent because the title of the company

to its property fails;¹ nor because the price paid was speculative and excessive;² nor because the vendor represented that the stock was worth its full face value;³ nor because the vendor, as an official of the corporation, had knowledge which enabled him to buy or sell at a profit;⁴ nor because the vendor was rendered willing to sell by threats of a call.⁵ A director of a corporation stands in no fiduciary relation toward a shareholder, with respect to a contract between them for the sale of stock; and fraud will not be presumed from the mere silence of the former concerning facts affecting the value of the stock known to him by virtue of his official connection with the company.⁶

1 *State v. North Louisiana etc. R. R. Co.* 34 La. An. 947.

2 *Moffat v. Winslow*, 7 Paige Ch. 124; *Allen v. Pegram*, 16 Iowa, 163.

3 *Union National Bank v. Hunt*, 76 Mo. 439.

4 *Board of Commissioners v. Reynolds*, 44 Ind. 509.

5 *Grant v. Attrill*, 11 Fed. Rep. 469.

6 *Johnson v. Lafin*, 5 Dill. 65, 83; *Grant v. Attrill*, 11 Fed. Rep. 469; *Jones v. Alley* (U. S. Cir. Ct. Ill. July, 1886); *Carpenter v. Danforth*, 52 Barb. 581; *Heman v. Britton*, 84 Mo. 657; S. C. 14 Mo. App. 109; *Board of Commissioners v. Reynolds*, 44 Ind. 509; *Gilbert's Case*, Law R. 5 Ch. 559. See further, as to fraudulent acts affecting sales of stock: *Comins v. Coe*, 117 Mass. 45; *Hemphling v. Burr* (1886), 59 Mich. 294; *Johnson v. Kirby*, 65 Cal. 482.

§ 355. Remedies of the party defrauded.—If the transferrer be guilty of such misrepresentations or concealments as would ordinarily entitle the purchaser of other kinds of personal property to have a sale set aside, the transferee of stock likewise will be discharged from his contract to purchase, or he may hold to his bargain and sue the transferrer for damages.¹ He may bring an action for damages for deceit against the party answerable for the fraud, either at law,² or in equity, the jurisdiction being concurrent in actions of this nature.³

Relief by bill in equity to set the transaction aside, is by far the easier means of redress, for in the equitable proceedings actual deceit need not be proven. Innocent acts or misrepresentations may be shown as constituting constructive fraud;⁴ and the vendor will sometimes be compelled to make his representations good.⁵ A purchaser wishing to repudiate the contract should tender back the stock received by him.⁶ If the purchaser has paid by note, he should not wait until action is brought to enforce its collection, for it will be no defense thereto that the purchase was induced by fraud. He should before trial disaffirm the contract and return the certificate of stock.⁷ A combination for the purpose of raising the price of stock by misrepresentations and fraudulent practices, may amount to a criminal conspiracy.⁸

1 Taylor on Corporations (2d ed. 1889), § 792.

2 *Wakeman v. Dalley*, 51 N. Y. 27; *Nelson v. Luling*, 62 N. Y. 645; *Miller v. Barber*, 66 N. Y. 558; *Newberg v. Garland*, 31 Barb. 121.

3 *Bradley v. Luce*, 99 Ill. 234; *Johnson v. Kirby*, 65 Cal. 482; *Stainbank v. Fernley*, 9 Sim. 556; *Peck v. Gurney*, Law R. 5 H. L. 377; *Hill v. Lane*, Law R. 11 Eq. 215, doubting *Ogilvie v. Currie*, 37 Law J. Ch. 541; *Campbell v. Fleming*, 1 Ad. & E. 40.

4 *Arkwright v. Newbold*, 17 Ch. Div. 301.

5 *Jones v. Bolles*, 9 Wall. 364.

6 *Francis v. New York etc. R. R. Co.* 17 Abb. N. C. 1.

7 *Gifford v. Carhill*, 29 Cal. 589.

8 *Regina v. Brown et al.* 7 Cox C. C. 442; *Regina v. Edalle*, 1 Forst. & F. 213; *Cook on Stock & Stockh.* § 357. But see *United States v. Britton*, 108 U. S. 199.

CHAPTER XV.

OF ILLEGAL SALES AND TRANSFERS.

- § 356. Of transfers of stock in breach of trust—(a). By ordinary trustees.
- § 357. The same subject, continued.
- § 358. The same subject, continued—The liability of the corporation herein.
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- § 367. Negligence as a bar to the real owner's remedy.
- § 368. No title can be founded on forgery—The purchaser's remedy.
- § 369. The corporation estopped to deny the title of a purchaser of new certificates of stock originally transferred by forgery.
- § 370. Of speculative and wager contracts for the sale of stock.

§ 356. Of transfers of stock in breach of trust—(a.) By ordinary trustees.—There is a distinction between the powers of an administrator or executor and those of an ordinary trustee, with respect to the sale of stock. The common duty of the former is administration or sale, while the duty of the latter is merely custody and management, unless the instrument creating the trust expressly confers the power to sell. The purchaser from one known to be a trustee, should look to the terms of the trust, for there is no implied power to sell, and a person

buying from a trustee or taking the stock by way of pledge deals with it at his peril,¹ although he may have had only constructive knowledge of the trusteeship.² The trustee of shares cannot create an equitable title in priority to the title of his *cestui que trust*.³ Yet a *bona-fide* purchaser for value, having neither actual nor constructive knowledge of the trust, will be protected, although the trustee acted in breach thereof (the American tendency being to place certificates of stock on a footing with negotiable paper).⁴ But a purchaser having actual knowledge that the trustee is selling or pledging the stock for his own private ends in breach of his trust, acquires no title by the transaction.⁵

1 Jaudon v. National City Bank, 15 Wall. 165; S. C. 8 Blatchf. 430; Bohlen's Estate, 75 Pa. St. 312; Bayard v. Farmers' etc. Bank, 52 Pa. St. 232.

2 Jaudon v. National City Bank, 15 Wall. 165, 176; S. C. 8 Blatchf. 430; Walsh v. Stille, 2 Parsons' Select Cas. Eq. 270; Loring v. Brodie, 134 Mass. 453; Loring v. Salisbury Mills, 125 Mass. 138; Simmons v. Southwestern R. R. Co. 5 Rich. Eq. 270; Shaw v. Spencer, 100 Mass. 382; Sweeney v. Bank of Montreal, 5 Can. Law T. 503.

3 Shropshire Union etc. Co. v. Regina, Law R. 7 H. L. 496.

4 Stinson v. Thornton, 56 Ga. 377; Cohen v. Grayson, 4 Md. Ch. 357; Salisbury Mills v. Townsend, 109 Mass. 115. Cf. Holbrook v. New Jersey Zinc Co. 57 N. Y. 616; Sprague v. Chicago Manuf. Co. 10 Blatchf. 173.

5 Duncan v. Jaudon, 15 Wall. 165; S. C. *sub nom.* Jaudon v. National City Bank, 8 Blatchf. 430; White v. Price, 29 Hun, 394; Simmons v. Southwestern R. R. Bank, 5 Rich. Eq. 279; Shaw v. Spencer, 100 Mass. 382; Walsh v. Stille (Pa. 1842), 2 Parsons' Select Cas. Eq. 17.

§ 357. The same subject, continued.—There are authorities which hold that, although the person dealing with the trustee may have actual knowledge of his fiduciary capacity, yet, if the name of the *cestui que trust* be not known, no investigation into the terms of the trust need be made;¹ upon the ground that the only source of information in regard to the trust is the trustee himself, and that, if his intent were fraudulent, inquiry

would lead to no result other than further deception. But "a more dangerous doctrine could not be laid down," for "it is impossible beforehand to come to the conclusion that a false answer would have been given, which would have precluded the necessity of further inquiry."² A trustee cannot sell stock of one kind for the purpose of reinvesting in another;³ nor even for the purpose of investing it in real estate;⁴ and, although it is said that he may sell where there is danger of depreciation,⁵ yet he will not be held liable for not doing so, if he acted in good faith.⁶ If the instrument creating the trust confer the power to sell for any purpose, such as to change the investment, or to discharge liabilities, the purchaser has a right to assume that the trustee is acting in good faith and within the scope of his authority.⁷ But, if the terms of the trust confer only a power to sell, a pledgee of the stock will not be protected;⁸ for a power to sell does not include the power to pledge.⁹

1 *Albert v. Baltimore*, 2 Md. 159; *Thompson v. Toland*, 48 Cal. 99; *Brewster v. Sime*, 42 Cal. 139.

2 *Shaw v. Spencer*, 100 Mass. 382, quoting with approval *Jones v. Williams*, 24 Beav. 62. See, also, the article by Francis B. Patten, 18 Am. Law Rev. 975, 982.

3 *Murray v. Feinour*, 2 Md. Ch. 418.

4 *Powlet v. Herbert*, 1 Ves. 297.

5 *Ward v. Kitchen*, 30 N. J. Eq. 31.

6 *Bowker v. Pierce*, 130 Mass. 262.

7 *Perry on Trusts* (3d ed.), § 225; *Lewin on Trusts* (7th ed.), 417. Cf. *Ashton v. Atlantic Bank*, 85 Mass. 217.

8 *Loring v. Brodie*, 134 Mass. 453.

9 *Merchants' Bank v. Livingston*, 74 N. Y. 223; *Cook on Stock & Stockh.* § 326.

§ 358. The same subject, continued—The liability of the corporation herein.—A company having notice of the fiduciary nature of a stockholder's title,

as, for example, from the word "trustee" upon the face of the certificate, and having the means of ascertaining the terms of the instrument creating the trust, will be liable to the *cestui que trust* for allowing registration of a transfer made in breach thereof.¹ In a recent English case it has been held that one co-executor has no authority to transfer railway stock registered in the names of both, and if he do so by signing the name of his co-trustee, he is liable for forgery;² and in an action against the company by the co-trustee and the trustee appointed to succeed the forger, the court may order that the plaintiffs be registered as the owners of the shares.³ As the statute of limitations does not begin to run until there is a complete cause of action, in such a case the time is to be computed from the demand of the plaintiffs upon the corporation to reinstate them and its refusal to do so.⁴ And where stock had been by mistake registered in the name of one of several beneficiaries instead of in the name of the trustee, the corporation was held liable to the other beneficiaries for permitting registration of a transfer of the whole interest made by the *cestui que trust* in whose name it stood.⁵ A court of equity⁶ will compel the corporation in such cases to buy stock in place of that which has been unlawfully transferred, and to register it in the name of the *cestui que trust*.⁷ But his remedy against the company may of course be waived or lost by laches.⁸ The *cestui que trust* has his remedy against the trustee also; but only to the extent that a judgment against the trustee has been satisfied does it constitute a bar to his remedy against the company.⁹ The fact that a director and actuary of the company

happen to have private notice of a trust does not affect the company with knowledge thereof.¹⁰

1 *Mechanics' Bank v. Seton*, 1 Pet. 299; *Magwood v. Railroad Bank*, 5 Richardson (S. C.), 379; *Bird v. Chicago etc. R. R. Co.* 137 Mass. 428; *Loring v. Salisbury Mills*, 125 Mass. 135, where the certificates contained the word "trustee"; *Bohlen's Estate*, 75 Pa. St. 312, where there were two trustees and the transfer was made by one only; *Bayard v. Farmers' etc. Bank*, 52 Pa. St. 232, where the company was sustained in refusing registration until its attorney had examined the terms of the trust; *Cottam v. Eastern Counties R'y Co.* 1 Johns. & H. 243, where the signatures of the other trustees were forged by one.

2 *Barton v. North Staffordshire R'y Co.* (Ch. Div. March, 1888) 4 R'y & Corp. Law J. 34; *Sloman v. Bank of England*, 14 Sim. 475.

3 *Barton v. North Staffordshire R'y Co.* (Ch. Div. March, 1888) 4 R'y & Corp. Law J. 34, 37.

4 *Barton v. North Staffordshire R'y Co.* (Ch. Div. March, 1888) 4 R'y & Corp. Law J. 34, 36, citing and quoting the opinion of BEST, C. J., in *Davis v. Bank of England*, 2 Bing. 393, and declaring that opinion not affected by the reversal of the case which was founded upon another point; citing also *Coles v. Bank of England*, 10 Ad. & E. 449, and *Sloman v. Bank of England*, 14 Sim. 486.

5 *Farmers' etc. Bank v. Wayman*, 5 Gill. 336.

6 The *cestui que trust* should file his bill in equity: *Loring v. Salisbury Mills*, 125 Mass. 138.

7 *Bohlen's Estate*, 75 Pa. St. 312.

8 *Albert v. Savings Bank*, 2 Md. 159; S. C. 1 Md. Ch. 407. A waiver of his remedy upon former breaches of the trust is no bar to his remedy upon a subsequent breach: *Loring v. Salisbury Mills*, 125 Mass. 138.

9 *Loring v. Salisbury Mills*, 125 Mass. 138.

10 *Ex parte Watkins*, *In re Kidder*, 2 Mont. & A. 348. *Acc. Ex parte Harrison*, 3 Mont. & A. 506.

§ 359. (b). By executors and administrators.—

With respect to sales of stock by executors and administrators, the rule is materially different from that regulating sales by trustees and guardians; for the duty of the latter is, primarily, merely custody, while the duty of the former is, primarily, sale and distribution.¹ Accordingly, the purchaser of stock from a duly qualified executor or administrator who buys in good faith and for value, is under no obligation to inquire whether the letters of administration or the will have expressly conferred the power to sell.² And in like manner a *bona-fide*

pledgee of stock, advancing money thereon to an executor or administrator, will be protected.³ As a matter of course, however, if the vendee knew that a sale of stock by an executor was made for his own private benefit, he cannot claim the protection accorded to *bona-fide* purchasers.⁴ A *bona-fide* purchaser from a tenant for life, to whom an administrator has improperly transferred the stock, will be protected.⁵

1 *Supra*, § 356.

2 *Leitch v. Wells*, 48 N. Y. 585; *Wood's Appeal*, 92 Pa. St. 379; *In re London etc. Telegraph Co.* Law R. 9 Eq. 633; *Clark v. South Metropolitan Gas Co.* 54 Law J. Ch. 259. *Cf.* *Prall v. Tilt*, 28 N. J. Eq. 479; *S. C.* 27 N. J. Eq. 393; *Lowry v. Commercial etc. Bank*, Taney, 310.

3 *Goodwin v. American National Bank*, 48 Conn. 550. *Cf.* *Crocker v. Old Colony R. R. Co.* 137 Mass. 417.

4 *White v. Price*, 39 Hun, 394; *Prall v. Hamil*, 28 N. J. Eq. 66.

5 *Keeney v. Globe Mill Co.* 39 Conn. 145.

§ 360. **The same subject, continued.**—The letters testamentary or the letters of administration are always sufficient evidence of authority to warrant the corporation in permitting the transfer to be registered.¹ The company is not obliged to inquire whether a transfer of stock made by an executor or administrator is for the purposes of the estate, nor is it liable for permitting registration thereof;² unless it has reasonable notice that there is a breach of trust.³ If an executor has also the duties of a trustee to perform, sales of stock by him in the latter capacity are subject to the rules governing transfers by trustees in general.⁴ And when the statutory period for settling the estate of a testator has elapsed, the executor, although still nominally acting in that capacity, is really acting under the more strictly defined powers of trustee for the pur-

poses of the will; and the presumption that he has the right to sell shares of stock for the payment of debts no longer exists. In such a case the corporation must examine the will and see to it that he has the right to transfer under the terms of that instrument.⁵

1 *Lowry v. Commercial etc. Bank*, Taney, 332; *Field v. Schieffelin*, 7 Johns. Ch. 155; *Hutchins v. State Bank*, 12 Met. 423; *Bayard v. Farmers' etc. Bank*, 53 Pa. St. 235; *Petrie v. Clark*, 11 Serg. & R. 377; 14 Am. Dec. 636; *Keene v. Roberts*, 4 Md. Ch. 332.

2 *Crocker v. Old Colony R. R. Co.* 137 Mass. 417; *Hutchins v. State Bank*, 53 Mass. 421; *Goodwin v. American National Bank*, 48 Conn. 553; *Carter v. Manufacturers' National Bank*, 71 Me. 448.

3 *Lowry v. Commercial etc. Bank*, Taney, 310; *Stewart v. Firemen's Ins. Co.* 53 Md. 564, where it was also held that the company is affected with knowledge of the contents of the will; but this is denied by *Hutchins v. State Bank*, 53 Mass. 421.

4 *White v. Price*, 39 Hun, 394; *Prall v. Tilt*, 28 N. J. Eq. 479; S. C. 27 N. J. Eq. 393.

5 *Lowery v. Commercial etc. Bank*, Taney, 332; *Bayard v. Farmers' etc. Bank*, 53 Pa. St. 235; *Petrie v. Clark*, 11 Serg. & R. 377; 14 Am. Dec. 633. See article on "The Rights and Duties of Corporations in Dealing with Stock held in a Fiduciary Capacity," by Francis B. Patten in 18 Am Law Rev. 975, 977.

§ 361. (c). **By guardians.**—At common law a guardian has the authority, as guardian, without any order of court, to sell personal property of his ward in his own possession and to reinvest the proceeds.¹ If by the sale of the stock the guardian defrauds his ward, his sureties are responsible; if the purchaser combines in the fraud, he too is chargeable, but the corporation cannot interfere and arrest the transfer of its stock by the legal holder of its certificates of stock. To require or permit it to do so, would trammel and embarrass such transactions so as to impede materially that transferable character which is one of the most valuable attributes of stock.² In the absence of some statutory provision, therefore, evidence from the probate court of the

guardian's appointment is all that a corporation need require.³ In most of the States, however, statutes have been passed, requiring guardians to obtain the consent of a court before selling the personal property of their wards,⁴ the effect of these enactments being to throw upon the purchaser, having notice that his vendor sells as guardian, the duty of seeing to it that he has been duly authorized by the court to sell.⁵ As in the case of a trustee upon whom the instrument creating the trust has conferred the power to sell, it is held that he is not thereby authorized to pledge the stock,⁶ so an order of court authorizing a sale of stock by a guardian does not empower him to pledge it.⁷

1 *Lamar v. Micou*, 112 U. S. 452, 475; *Field v. Schieffelin*, 7 Johns. Ch. 154; 11 Am. Dec. 441.

2 *Bank of Virginia v. Craig*, 6 Leigh, 399, 432.

3 See article by Francis B. Patten, 18 Am. Law Rev. 975, 978.

4 *Cook on Stock & Stockh.* § 328. For an example of these statutes see *Mass. Rev. Stat. ch. 79, § 21*, substantially followed in *Mass. Pub. Stat. ch. 139, § 38*, which has been held not to take away the guardian's discretionary power over his ward's personal property; and even though the sale afterward prove to have been in breach of duty, a perfect title passes to a bona-fide purchaser: *Wallace v. Holmes*, 9 Blatchf. 65. Apparently *contra* is *Atkinson v. Atkinson*, reviewed and criticised in article by Francis B. Patten, 18 Am. Law Rev. 975, 980.

5 *Atkinson v. Atkinson*, 90 Mass. 15. But see 18 Am. Law Rev. 975, 979, where the object is said to be to enable guardians to protect themselves absolutely by obtaining the authority of court *before* the sale, instead of leaving them to take the chance of obtaining the ratification of the court after the sale.

6 *Vide supra*, § 357.

7 *Webb v. Graniteville Manuf. Co.* 11 S. C. 336.

362. (d). By agents.—An agent intrusted with the possession of certificates of stock for one purpose cannot lawfully make use of them for any other. Thus an agent, to collect dividends, cannot lend the stock;¹ nor can an agent to sell pledge it.² A corporation knowing that the vendor of cer-

tificates indorsed in blank is acting as agent for another, is liable for allowing registration of the transfer if the agent had not authority to sell.³ When the same person acts as agent both for vendor and vendee, and absconds with the proceeds of the sale after the certificates have been delivered, but before the transfer has been registered on the books of the company, the vendee is entitled to have the stock registered in his name, and the loss will fall upon the vendor.⁴

1 *Persch v. Quiggle*, 57 Pa. St. 247. He will be personally liable for its loss, although he had informed the owner of the loan, and no objection was made.

2 *Merchants' Bank v. Livingston*, 74 N. Y. 223; *Fisher v. Brown*, 104 Mass. 259; *Sabin v. Bank of Woodstock*, 21 Vt. 353; *Colquhoun v. Courte-way*, 43 Law J. Ch. 338.

3 *Woodhouse v. Crescent Mutual Ins. Co.* 35 La. An. 238.

4 *Ex parte Shaw*, 2 Q. B. 463; *Cook on Stock & Stockh.* § 322.

§ 363. (e). **By assignees in insolvency.**—The duty of an assignee in insolvency, like that of an executor or administrator, is, primarily, to collect the assets of the insolvent, and reduce them to money for the payment of debts. Accordingly, a corporation may safely permit him to transfer the stock of his insolvent upon producing the instrument of assignment under seal of the court;¹ and although, by statute, he may be required to sell at public auction, such a provision has been held to be intended to secure a proper accountability on his part, to be directory merely, and not to render the title of *bona-fide* purchasers void by reason of his failure to comply therewith.²

1 See article by Francis B. Patten, 18 Am. Law Rev. 975, 977.

2 *Turite v. Stevens*, 98 Mass. 307.

§ 364. **Of lost and stolen certificates.**—Where shares of corporate stock have been lost or stolen from their true owner, and there is no fault or negligence on his part, no rights superior to his are acquired, even by an innocent purchaser for value, from the finder or thief, although the certificates may have been duly indorsed by a prior owner in whose name they appear on the books of the corporation.¹ Neither the absence of blame on the part of the officers of the company in allowing an unauthorized transference of stock, nor the good faith of the purchaser of stolen property, will avail as an answer to the demand of the true owner.² An innocent purchaser of a stolen certificate acquires no title to the stock, even though it may have been indorsed in blank; and he cannot demand that the company recognize him as a stockholder.³ If, however, the transferee of the finder or thief has been registered, and new certificates issued to him in ignorance of the flaw in his title, *his transferee* will be protected,⁴ even, it is said, although he had notice of the facts.⁵ The owner of certificates which have been lost or stolen may, upon giving a bond of indemnity to the corporation, require new certificates to be issued.⁶

1 *Barstow v. Savage Mining Co.* 64 Cal. 388; S. C. 49 Am. Rep. 705; *Sherwood v. Meadow Valley etc. Co.* 50 Cal. 412; *Brown v. Hartford Fire Ins. Co.* 42 Md. 384.

2 *Telegraph Co. v. Davenport*, 97 U. S. 369.

3 *Barstow v. Savage etc. Co.* 64 Cal. 388; 49 Am. Rep. 705, substantially overruling *Winter v. Belmont etc. Co.* 53 Cal. 428; *Sherwood v. Meadow Valley etc. Co.* 50 Cal. 412; *Cook on Stock & Stockh.* § 368. Cf. *Anderson v. Nicholas*, 28 N. Y. 600; *Aull v. Colket*, 33 Leg. Intell. 44; *Biddle v. Bayard*, 13 Pa. St. 150; *Buffalo etc. Co. v. Alberger*, 22 Hun, 349.

4 *Mandlebaum v. North American etc. Co.* 4 Mich. 465.

5 *State v. New Orleans etc. Co.* 25 La. An. 413.

6 N. Y. Laws of 1873, ch. 151; *Galveston City Co. v. Sibley*, 56 Tex. 209. Cf. *Greenleaf v. Ludington*, 15 Wis. 558.

§ 365. **Of forged transfers of stock.**—The duty of the corporation herein.—Forgery can confer no power, nor transfer any rights. The officers of the company are the custodians of its stock books, and it is their duty to see that transfers are properly made, either by the stockholders themselves, or persons having authority from them. If upon the presentation of a certificate for transfer they are at all doubtful of the identity of the party offering it, or not satisfied respecting the genuineness of a power of attorney produced, they can require the identity of the party in the one case, and the genuineness of the document in the other, to be satisfactorily established before allowing the transfer to be made. In either case they must act upon their own responsibility.¹ It seems that a company upon ascertaining that a purchaser has been registered upon a transfer containing a forgery, of which the purchaser had no knowledge, may restore the name of the vendor to the register, although he make no claim to the shares; or, at any rate, it may refuse to acknowledge the purchaser as a shareholder.² If the corporation has been compelled to pay damages to the real owner of stock for permitting registration of a forged transfer, it may recover from the transferee, although he had no knowledge of the forgery; for it is said that there is an implied warranty on the part of a transferee that his title is valid, and that he has a right to have the shares registered in his name.³

1 *Telegraph Co. v. Davenport*, 97 U. S. 369.

2 *Brown & Theobald's Railway Law*, 71; *Hare v. London, etc. R'y Co.* John. 722; S. O. 7 Jur. N. S. 1145.

3 *Boston etc. R. R. Co. v. Richardson*, 135 Mass. 423.

§ 366. Of forged transfers of stock.—The remedy of the real owner.—A corporation permitting registration of a forged transfer of shares of stock does so at its peril. It is answerable to the real owner of the shares for its failure to detect the forgery;¹ and the latter may proceed against the company either in equity to enforce a retransfer of the shares to him, or he may bring an action at law for damages.² He may require the cancellation of his name to be restored;³ and the company may be compelled to issue new certificates to him,⁴ and to account to him for dividends.⁵ If the company have no shares to supply the place of those which it has negligently allowed to be transferred, it may be required to go upon the market and purchase similar shares for that purpose.⁶ If a corporation has by negligence canceled a person's stock, and issued certificates therefor to a third party, who has purchased it from one not authorized to sell it, the true owner, according to the weight of authority, is not bound to pursue the purchaser, but may call upon the corporation directly to do him right and justice by replacing his stock, or paying him for its value,⁷ although, of course, he has his remedy also against all persons participating in the transaction, and may make them all parties defendant together with the corporation.⁸

1 *Telegraph Co. v. Davenport*, 97 U. S. 369; *Day v. American Tel. etc. Co.* N. Y. Daily Reg. July 18, 1885; *Pollock v. National Bank*, 1 N. Y. 274; *Blaisdell v. Burr* 68 Ga. 56; *Mayor etc. of Baltimore v. Ketchum*, 4 Md. 23; *Michigan National Bank v. Field* 123 Mass. 345; *Pratt v. Boston etc. R. R. Co.* 123 Mass. 43; *Loring v. Sausbury Mills Co.* 125 Mass. 122; *Pratt v. Taunton etc. Manuf. Co.* 123 Mass. 110; *Bowell v. Boston Water Power Co.* 66 Mass. 57; *Baltimore & Md. Ry. Co. v. 12 C. m. B.* 45; *Swart v. North British etc. Co.* 7 Har. & W. 63; *Carter v. London etc. Ry. Co.* 41 Law T. N. 855; *Davis v. Bank of England* 2 Bing. 393; *Midland Counties Ry. Co. v. Taylor* 8 H. L. Cas. 751 affirming *Taylor v. Midland Ry. Co.* 9 Law J. Ch. 731; *Cottam v. Eastern Counties Ry. Co.* 1 Johns. & H. 362; *Ex*

parte Swan, 7 Com. B. N. S. 400; *Johnston v. Renton*, Law R. 9 Eq. 181; *Slo-man v. Bank of England*, 14 Sim. 475.

2 *Pollock v. National Bank*, 7 N. Y. 274; *Blaisdell v. Bohr*, 68 Ga. 56; *Midland R'y Co. v. Taylor*, 8 H. L. Cas. 751; *Swan v. North British etc. Co.* 2 Hurl. & C. 175; *Cottam v. Eastern Counties R'y Co.* 1 Johns. & H. 243; *Johnston v. Renton*, 9 Eq. 181; *Browne & Theobald's Railway Law*, 71.

3 *Johnston v. Renton*, Law R. 9 Eq. Cas. 181; *Cottam v. Eastern Counties R'y Co.* 1 Johns. & H. 243; *Slo-man v. Bank of England*, 14 Sim. 475.

4 *Pollock v. National Bank*, 7 N. Y. 274; *Blaisdell v. Bohr*, 68 Ga. 56.

5 *Pollock v. National Bank*, 7 N. Y. 274; *Blaisdell v. Bohr*, 68 Ga. 56; *Dalton v. Midland R'y Co.* 12 Com. B. 453; and in an action therefor the company cannot interplead.

6 *Pratt v. Boston etc. R. R. Co.* 126 Mass. 443.

7 *St. Romes v. Cotton Press Co.* 127 U. S. 614, 620, citing *Loring v. Frue*, 104 U. S. 223; *Telegraph Co. v. Davenport*, 97 U. S. 369; *Loring v. Salisbury Mills*, 125 Mass. 138; *Pratt v. Taunton Copper Co.* 123 Mass. 110; *Salisbury Mills v. Townsend*, 109 Mass. 116; *Pennsylvania R. R. Co's Appeal*, 86 Pa. St. 80; *S. P. American Telegraph etc. Co. v. Day*, 52 N. Y. Super. Ct. 128; *Mayor etc. of Baltimore v. Ketchum*, 57 Md. 23; *Pratt v. Boston etc. R. R. Co.* 126 Mass. 443.

8 *Blaisdell v. Bohr*, 68 Ga. 56. If the forgery has been committed by a member of a firm, the real owner may recover from the firm the value of the stock and dividends paid thereon, in an action for money had and received: *Marsh v. Keating*, 1 Bing. (N. C.) 198; *Marsh v. Stone*, 6 Barn. & C. 551.

§ 367. **Negligence as a bar to the real owner's remedy.**—A person may be deprived of his right to insist upon the invalidity of a forged transfer by negligence; but the negligence to be sufficient must be in the transaction itself and the proximate cause of leading the party who acts upon the forgery into the mistake, and it must be the neglect of some duty owing to that party or to the general public.¹ Standing by and permitting registration to be made as if the transfer were valid, will estop the real owner from questioning its validity.² But the real owner will not be estopped from asserting his claim by the careless custody of a seal,³ nor by having executed transfers in blank,⁴ nor by giving an erroneous address so that a letter of inquiry did not reach him,⁵ nor by a delay of several months whereby the forger was enabled to escape.⁶ It has even been said that

the real owner will not be estopped by allowing his clerk, the forger, to have access to his papers, and intrusting him with blank transfers duly signed to use in transferring other stock.¹ But it is submitted that such a ruling practically renders the corporation an insurer of the integrity of every agent through whom a stockholder may transact his business; and that if this be law, no company may safely venture to permit registration of any transfer without requiring the personal presence of the transferer. It is held also upon high authority that the negligence of a guardian does not estop the ward from pursuing his remedy against the corporation for permitting registration of a forged transfer of stock;² which would seem to place the company in the position of bondsman to secure the faithful and diligent performance of the duties of trustees.

1 *Coventry v. Great Eastern R'y Co.* 11 Q. B. 776; *Baxendale v. Bennett*, 3 Q. B. 525; *Arnold v. Cheque Bank*, 1 Com. P. Div. 578; *Swan v. North British etc. Co.* 2 Hurl. & C. 181. *Cf. Sewall v. Boston etc. Co.* 86 Mass. 277; *Coles v. Bank of England*, 10 Ad. & E. 437.

2 *Coles v. Bank of England*, 10 Ad. & E. 437; *McKenzie v. British Linen Co.* 6 App. C. 82.

3 *Bank of Ireland v. Evans' Charities*, 5 H. L. Cas. 389.

4 *Taylor v. Great Indian etc. R'y Co.* 4 De Gex & J. 559; *Swan v. North British etc. Co.* 2 Hurl. & C. 175. *Cf. Donaldson v. Gillout*, 3 Eq. 274.

5 *Johnston v. Renton*, Law R. 9 Eq. 181.

6 *Davis v. Bank of England*, 2 Bing. 393.

7 *Swan v. North British etc. Co.* 7 H. & N. 603, substantially overruling *Ex parte Swan*, 7 Com. B. N. S. 400; *Cook on Stock & Stockh.* § 366.

8 *Telegraph Co. v. Davenport*, 97 U. S. 369.

§ 368. **No title can be founded on forgery—The purchaser's remedy.**—No title can be founded on forgery.¹ The immediate purchaser from one who makes a forged transfer of stock has no rights whatever against the corporation. He cannot require the transfer to be registered; nor, if it has been reg-

istered before the forgery came to light, can he require the company to recognize him as a shareholder after the discovery thereof. He can neither restrain it from canceling the registry nor maintain an action for damages upon the cancellation;² unless, perhaps, he was induced to believe in the validity of the transfer by the very fact that the company permitted registration to be made.³ But if the company by mistake permits such a transfer to be registered, it is not estopped to deny the title of the transferee.⁴ The immediate purchaser from a person making a forged transfer, to whom new certificates of stock have been issued, cannot retain them as against the real owner of the old ones.⁵ But when he is deprived of them by reason of his vendor's having received them under a forged transfer, he may recover from the latter upon the implied warranty of title, although the vendor himself had no knowledge of the forgery.⁶ But an agent selling stock which his principal acquired under a forged transfer cannot be held liable to the vendee.⁷

1 *Davis v. Bank of England*, 2 Bing. 393; *Hare v. London etc. R'y Co.* John. 722; S. C. 7 Jur. N. S. 1145.

2 *Whitewright v. American Tel. etc. Co.* N. Y. Daily Reg. Aug. 6th, 1886; *Hambleton v. Central etc. R. R. Co.* 44 Md. 551; *Brown v. Howard Ins. Co.* 42 Md. 384; *Hildyard v. South Sea Co.* 2 P. Wms. 76; *Waterhouse v. London etc. R'y Co.* 41 Law T. N. S. 553; *Simm v. Anglo-American Tel. Co.* 5 Q. B. Div. 188. Cf. *Ashby v. Blackwell*, 2 Eden, 299.

3 *Metropolitan Savings Bank v. Mayor etc. of Baltimore*, 63 Md. 6.

4 *Waterhouse v. London etc. R'y Co.* 41 Law T. 553; *Simm v. Anglo-American Tel. Co.* 5 Q. B. Div. 188.

5 *Cook on Stock & Stockh* § 364; *Johnston v. Renton*, Law R. 9 Eq. Cas. 181.

6 *Matthews v. Massachusetts National Bank*, 1 Holmes, 396.

7 *Machinists' National Bank v. Field*, 126 Mass. 345.

§ 369. The corporation estopped to deny the title of a purchaser of new certificates of stock originally transferred by forgery.—If the pur-

chaser of stock, under a forged transfer, has been registered, and has obtained new certificates from the company which he sells to a *bona-fide* purchaser, the company is liable to the latter purchaser, and is bound to make good the representations contained in the new certificates, the measure of damages being the value of the stock at the time of its first refusal to recognize him as a shareholder, together with the legal rate of interest.² Such a *bona-fide* purchaser of the new certificate cannot be compelled to relinquish his stock either to the corporation or to the real owner.² For the giving of a certificate is a declaration by the company to all the world that the person in whose name the certificate is made out and to whom it is given is a shareholder in the company; and it is given by the company with the intention that it shall be so used by the person to whom it is given, and acted upon in the sale and transfer of shares.³

1 In re Bahia etc. R'y Co. Law R. 3 Q. B. 584; Hart v. Frontino etc. Co. Law R. 5 Ex. 111.

2 Machinists' National Bank v. Field, 126 Mass. 345; In re Bahia etc. R'y Co. Law R. 3 Q. B. 584.

3 Machinists' National Bank v. Field, 126 Mass. 345; In re Bahia etc. R'y Co. Law R. 3 Q. B. 584; Manhattan Beach Co. v. Harned, 23 Blatchf. C. C. 494.

§ 370. Of speculative and wager contracts for the sale of stock.—Wager contracts were not at common law necessarily void.¹ Generally, however, in this country, all wagering contracts are held to be against public policy,² and under modern statutory law, both in England³ and in America, wagering contracts,⁴ and speculative sales of stock, are rendered void.⁵ But the history of these stock-wagering acts seems to prove conclusively that they

have never been effective in preventing speculations in stocks. "In almost every instance in which they have been adopted . . . they have finally been repealed."⁶ The criterion by which to determine the legality of speculative contracts for the sale of stock is the intent of the parties. If they intended an actual delivery, the contract is valid; if they intended merely to pay the difference between the contract price and the market value at the time agreed upon for delivery, the transaction is a wager and illegal. The intent of the parties is usually a question of fact for the jury.⁷

1 Dewey on Contracts, 10.

2 *Irwin v. Williar*, 110 U. S. 499, and cases there cited.

3 8 & 9 Vict. ch. 109, § 18. *Cf. Thacker v. Hardy*, 4 Q. B. Div. 689; *Grizewood v. Blane*, 11 Com. B. 526; *Barry v. Croskey*, 2 Johns. & H. 1.

4 N. Y. 1 Rev. S. at. 662, § 8; *Harris v. Turnbridge*, 83 N. Y. 92; *Kingsbury v. Kirwan*, 77 N. Y. 612; *Story v. Saloman*, 71 N. Y. 420; *Yerkes v. Saloman*, 11 Hun, 471.

5 *Cook on Stock & Stockh.* § 342, where the statutes are cited in detail, together with the decisions under them. That "cornering" the market is illegal, see *Arnot v. Pittston etc. Coal Co.* 68 N. Y. 558; *Sampson v. Shaw*, 101 Mass. 145; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. St. 173; *Rammond v. Leavitt*, 13 Cent. Law J. 110; *Barry v. Croskey*, 2 Johns. & H. 1. With respect to contracts to buy or sell stock for the purpose of controlling the market price, see *Tohey v. Robinson*, 99 Ill. 202; *Quincy v. White*, 63 N. Y. 370, 383; *Fisher v. Bush*, 35 Hun, 641; *Livermore v. Bushnell*, 5 Hun, 285.

6 *Dos Passos on Stock Brokers and Stock Ex.* 405.

7 *Roundtree v. Smith*, 108 U. S. 269; *In re Hunt*, 26 Fed. Rep. 739; *Greenhood on Public Policy*, 230-237. For further authorities on this point and for a fuller discussion of the subject of speculative sales of stock, the reader is referred to the works upon that branch of the law: *Dewey on Contracts for Future Delivery, and Commercial Wagers*; *Dos Passos on Stock Brokers and Stock Ex.*; *Lowell on Transfer of Stocks*; and notably the very able discussion of these questions in *Cook on Stock & Stockh.* ch. 20, B. §§ 341-348.

CHAPTER XVI.

OF REGISTRATION OF TRANSFERS.

- § 371. Registration—For what purposes requisite.
- § 372. (a). To relieve the transferrer from liability to the corporation and to its creditors.
- § 373. The transferrer may recover calls paid by him from his transferee.
- § 374. (b). To entitle the transferee to a shareholder's rights and privileges.
- § 375. (c). To protect the transferee against the creditors of his transferrer.
- § 376. The same subject, continued—The contrary rule.
- § 377. (d). To protect the transferee from a fraudulent transfer of the same stock.
- § 378. (e). For the benefit and protection of the corporation.
- § 379. The formal requisites of registration of transfers.
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- § 382. Notification of transfer, and demand of registration.
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- § 385. In what books transfers may be recorded.
- § 386. Registration dates only from the actual entry upon the books.
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- § 390. The same subject, continued—Of by-laws creating a lien.
- § 391. Extent of the corporate lien—The general rule.
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- § 394. The lien enforceable for the benefit of the company alone.
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—Interpleader.
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- § 400. The rights and remedies of holders of outstanding certificates as against the transferor.
- § 401. The rights and remedies of holders of outstanding certificates as against the corporation.
- § 402. The rights of a transferee, the certificates outstanding.
- § 403. The remedy of a transferee, the certificates outstanding.

§ 371. **Registration—For what purposes requisite.**—Registration upon the books of the corporation is said to be an essential part of a valid transfer of shares of stock;¹ and it is generally provided, either by the charters of the companies, or by general statutory enactments of the States, that no transfer shall be valid or effectual until registration has been made. But these provisions are not construed to affect the validity of the transaction as between the parties themselves.² Indeed, the enactments themselves, declaring unregistered transfers invalid, frequently contain the saving clause, “except as between the parties thereto.”³ And they are generally construed as similar in purpose to statutes requiring deeds conveying interests in real estate to be lodged for record, under which it has been uniformly held that the title passes to the grantee, as between the parties to the conveyance, notwithstanding that the deed may remain unrecorded.⁴ In like manner, the object of having transfers of shares recorded upon the books of the company, is to give notice to the public and to any third party claiming an interest in the stock, that a transfer has been made.⁵ For this reason an un-

registered transfer of shares of stock is binding not only upon the parties, but also as against all persons having actual knowledge thereof.⁶ The sense in which an unrecorded transfer is invalid, and the purposes for which registration is essential, are considered in the following sections.

1 *Topeka Manuf. Co. v. Hall* (1888), 39 Kan. 23. And many general statements to that effect will be found scattered throughout the opinions treating the subject of transfers of shares.

2 *Johnson v. Laffin*, 103 U. S. 800, 804; *Baldwin v. Canfield*, 26 Minn. 43; *Noyes v. Spaulding*, 27 Vt. 420.

3 For example, see Ky. Gen. Stat. ch. 56, § 11; re-cited in *Thurber v. Crump* (1888), 86 Ky. 403.

4 *Noyes v. Spaulding*, 27 Vt. 420.

5 *Noyes v. Spaulding*, 27 Vt. 420. See also *Continental National Bank v. Eliot National Bank*, 7 Fed. Rep. 369; *Merchants' etc. Bank v. Richards*, 6 Mo. App. 654.

6 *Noyes v. Spaulding*, 27 Vt. 420. *Acc.* *United States v. Cutts*, 1 Sumner, 133; *Johnson v. Underhill*, 52 N. Y. 203; *Bank of Utica v. Smalley*, 2 Cowen, 770; 14 Am. Dec. 526; *First National Bank v. Gifford*, 47 Iowa, 575. *Cf.* *Baldwin v. Canfield*, 26 Minn. 43, "solely for the protection and benefit of the corporation."

§ 372. (a). To relieve the transferrer from liability to the corporation and to its creditors.—An unregistered transfer of shares is invalid as between the transferrer and the corporation with respect to the unpaid balance of the original subscription to the stock; unless the company has accepted the transferee as a stockholder by some act equivalent to a formal registration; in which case, it can no longer hold the transferrer liable for calls.¹ But with this exception, the person in whose name the shares stand recorded upon the corporate stock-book, continues liable to the company for calls, and to the corporate creditors for the whole balance remaining unpaid upon the original subscription to the stock.² And it does not avail the transferrer that he has in good faith attempted to have the

transfer registered, if in fact it has not been done.³ No contract between him and his transferee, by which the latter may undertake to assume this liability, will deprive the corporation or its creditors of the right to look to him for payment.⁴ It has become a part of the statutory law of England that until the deed of transfer is delivered to the secretary of the company for registration, the vendor remains liable for calls.⁵ On the other hand, a transfer of shares made in good faith and duly registered upon the books of the company, releases the transferrer absolutely from all liability upon the stock, whether a part or the whole of the subscription price remains unpaid;⁶ although the registration be made by the company against the protest of the transferee.⁷ But the registration of a transfer to an infant, or an insolvent person, or to any one against whom the corporate creditors could have no recourse, made for the purpose of evading liability upon the stock and in contemplation of the impending insolvency of the company, will be ineffectual to relieve the transferrer of his liability;⁸ and in Pennsylvania, an original subscriber to the stock of companies formed under the General Railroad Act of 1849 continues liable upon the unpaid balance of the subscription, notwithstanding a transfer made in good faith to a solvent transferee;⁹ so also in Maryland.¹⁰ In England, however, a contrary rule prevails with respect to transfers to infants and irresponsible parties, provided only that the transfer be absolute, with no secret trust between the parties for the benefit of the transferrer in the event that the contemplated insolvency does not occur.¹¹

1 *Vide infra*, § 335.

2 *Shellington v. Howland*, 53 N. Y. 371; *Rosevelt v. Brown*, 11 N. Y.

him from his transferee.¹ If the shares have been again transferred, the first transferrer may have recourse upon either the immediate² or the ultimate transferee.³ Likewise a vendor of shares for future delivery, who to save them from forfeiture has paid calls thereon, may decline to deliver until reimbursed by the vendee.⁴ There are a few cases from which it would appear that a call made before, but payable after, a transfer has been completed, should be paid by the transferrer;⁵ but other cases hold the transferee liable.⁶ The question is one to which an *a priori* answer cannot be confidently given. It must be determined by the circumstances of the case, the contract between the parties, and the statutes of the State.⁷ In New York, under the General Railroad Act of 1850, no share is transferable "until all previous calls thereon shall have been fully paid in."⁸ Accordingly, it would seem that in this State the transferrer must before making the transfer pay any call made prior thereto, although not payable until after. A similar statute has been enacted in California, with respect to shares of railway companies.⁹

1 Johnson v. Underhill, 52 N. Y. 203; Lord v. Hutzler (1886), 64 Md. 534; Hutzler v. Lord, 64 Md. 534; Brigham v. Mead, 10 Allen, 245; Kellogg v. Stockwell, 75 Ill. 68; Castellan v. Hobson, Law R. 10 Eq. Cas. 47; Kellock v. Enthoven, Law R. 9 Q. B. 241; S. C. Law R. 8 Q. B. 453; Bowring v. Shepherd, Law R. 6 Q. B. 309; Davis v. Haycock, Law R. 4 Ex. 373; Grissell v. Bristowe, Law R. 3 Com. P. 112; Chapman v. Shepherd, Law R. 2 Com. P. 228; Walker v. Bartlett, 18 Com. B. 845; Humble v. Langsdon, 7 Mees. & W. 517; Morawetz on Corporations (2nd ed.) § 175. Cf. Shaw v. Fisher, 2 De Gex & S. 11; S. C. 5 De Gex, M. & G. 596.

2 Kickalls v. Eaton, 23 Law T. N. S. 689.

3 Hawkins v. Maltby, Law R. 3 Ch. 188.

4 Whitney v. Page, N. Y. Daily Reg. March 31, 1885.

5 Schenectady etc. Plank Road Co. v. Thatcher, 11 N. Y. 102, 113; North American etc. Association v. Bentley, 19 Law J. Q. B. 427.

6 West Philadelphia Canal Co. v. Innes, 3 Whart. 198; Aylcsbury R'y Co. v. Mount, 4 Man. & G. 651; S. C. 5 Scott's N. R. 127.

7 See Thompson on Liabilities of Stockholders, § 210; Morawetz on Corporations (2nd ed.) § 161. Cf. *Schenectady etc. Plank Road Co. v. Thatcher*, 11 N. Y. 162.

8 N. Y. Laws 1853, ch. 140, § 8.

9 *Brewster v. Hartley*, 37 Cal. 15; 99 Am. Dec. 237.

§ 374. (b). To entitle the transferee to a shareholder's rights and privileges.—The right of the transferee to receive dividends from the company,¹ his right to vote and to enjoy the other privileges of a stockholder, depends upon the registration of his name upon the corporate books.² In England, the Companies' Clauses Act of 1845 provides that, until the deed of transfer be delivered to the secretary of the corporation for the purpose of registration, the purchaser is not entitled to any share in the profits of the undertaking, nor to vote upon the stock at corporate meetings.³ An unregistered transfer may, however, as between the transferee and the corporation, vest in him such a title as will make him a proper party to an action instituted to set aside a sale of the corporate property, although the transfer was made for that purpose upon the same day that the suit was brought, and the money to pay for the stock was deposited to the transferee's credit by the party wishing him to join in the action.⁴

1 *Supra*, § 305.

2 *Continental National Bank v. Eliot National Bank*, 7 Fed. Rep. 308; *Merchants' etc. Bank v. Richards*, 6 Mo. App. 654.

3 8 Vict. ch. 16, § 15.

4 *Erwin v. Oregon Railway and Navigation Co.* 35 Hun. 544.

§ 375. (c). To protect the transferee against the creditors of his transferrer.—In many of the American States, when registration of transfers is required and an unregistered transfer is declared

invalid except as between the parties, by the charter or by statute,¹ or even, it has been said, by the by-laws of the company,² it is essential that registration be made before a purchaser of shares will be protected from an attachment or execution upon the stock by creditors of his vendor.³ This is the rule in Maine,⁴ New Hampshire,⁵ Vermont,⁶ Connecticut,⁷ and in California,⁸ and in several of the North-western States.⁹ This was also the rule formerly in Massachusetts. Under the statute in Massachusetts,¹¹ making shares transferable by an instrument to be recorded in the book of the corporation, and declaring the transferee entitled to a new certificate upon tendering the instrument and giving up the old certificate, it was held that prior to a compliance with these provisions in a suit against the assignor the shares might be attached.¹² But although the transfer be unrecorded it will take precedence over an attachment by a creditor who has notice of the transfer.¹³

1 *In re Murphy*, 51 Wis. 519; *Weston v. Bear River etc. Co.* 5 Cal. 186; 63 Am. Dec. 117. And see *Newall v. Williston*, 138 Mass. 240; *Central Bank v. Williston*, 138 Mass. 244; *Fisher v. Essex Bank*, 71 Mass. 373; *Taylor on Corporations* (2nd ed. 1889), § 796.

2 *Dutton v. Connecticut Bank*, 13 Conn. 493. *Contra*, *Boston Music Hall v. Cory*, 129 Mass. 434; *Sargent v. Essex etc. R'y Co.* 26 Mass. 202.

3 See cases cited *supra*, notes 1 and 2.

4 *Skowhegan Bank v. Outler*, 49 Me. 315; *Fiske v. Carr*, 20 Me. 301.

5 *Pinkerton v. Railroad Co.* 42 N. H. 424.

6 *Warren v. Brandon Manuf. Co.* cited 52 Vt. 75.

7 *Dutton v. Connecticut Bank*, 13 Conn. 493; *Oxford Turnpike Co. v. Bunnell*, 6 Conn. 552. But see *Colt v. Ives*, 31 Conn. 25; 81 Am. Dec. 161.

8 *Farmers' National Bank v. Wilson*, 58 Cal. 600; *Naglee v. Pacific Wharf Co.* 20 Cal. 529; *Strout v. Natoma etc. Co.* 9 Cal. 78; *Weston v. Bear River etc. Co.* 5 Cal. 1-6; 63 Am. Dec. 117. But compare *Weston v. Bear River etc. Co.* 6 Cal. 425.

9 *State v. First National Bank*, 89 Ind. 302; *Coleman v. Spencer*, 5 Blatchf. (Ind.) 197; *People's Bank v. Gridley*, 91 Ill. 457; *In re Murphy*, 51 Wis. 519.

11 Mass. Stat. 1870, ch. 224.

12 *Central Bank v. Williston*, 138 Mass. 244.

13 *Bridgewater Iron Co. v. Lissbeyer*, 116 U. S. 8; being a Massachusetts appeal. But see *Newell v. Williston*, 138 Mass. 240, construing Mass. Pub. Stat. ch. 105, § 24, where it was held that although the attaching creditor knew of the transfer, and of an informal registration thereof, he might hold the stock under his attachment.

§ 376. **The same subject continued—The contrary rule.**—But a contrary rule prevails in the great commercial center of the country, where the tendency of the courts is to facilitate as much as possible the free circulation of this class of securities.¹ Accordingly, although it be provided that the stock shall be transferable only on the books of the company, and the certificate states that shares are transferable only in this manner, a *bona-fide* sale or pledge of shares accompanied by a delivery of the certificates, with a power of attorney to make registration of the transfer, is valid as against the attaching creditors of the vendor or pledgor, and also as against his assignee in insolvency.² And in this position the courts of New York are sustained by the decisions in South Carolina,³ Louisiana,⁴ Kentucky,⁵ Texas,⁶ Tennessee,⁷ Missouri,⁸ Michigan,⁹ Rhode Island,¹⁰ New Jersey,¹¹ and Pennsylvania.¹² The federal courts follow the New York rule,¹³ even in States where the opposite rule prevails.¹⁴ Even Massachusetts, which set the evil example followed by the New England and Northwestern States above enumerated, has since fallen into line with the States adhering to the better rule.¹⁵ And in Maryland there is an act which provides that no attachment or garnishment levied on the stock of any corporation shall affect the rights of any pledgee acquired prior to the levy, or prevent the pledgee and the corporation from transferring the stock upon the books of the company.¹⁶

In England no notice to the company is necessary to make an equitable assignment of shares effectual against judgment creditors of the shareholder,¹⁷ since the decision of the House of Lords that shares are *choses in action*.¹⁸ But a person cannot, as against an attaching creditor, make a transfer to another creditor of more shares than are necessary to secure his debt, for which there has been an equitable hypothecation, notice of the attachment having been duly served on the corporation.¹⁹

1 *Smith v. American Coal Co.* 7 Lans. 317; *Comeau v. Guild Farm Oil Co.* 3 Daly, 218; Taylor on Corporations, § 796.

2 Taylor on Corporations, § 796.

3 *Fraser v. Charleston*, 11 S. O. 486, 519.

4 *Pitot v. Johnson*, 36 La. An. 1286; *Smith v. Crescent City etc. Co.* 30 La. An. 1378.

5 *Thurber v. Crump* (1863), 86 Ky. 408.

6 *Seeligson v. Brown*, 61 Tex. 114.

7 *Cornick v. Richards*, 3 Lea, 1. But see *State Ins. Co v. Sax*, 2 Tenn. Ch. 507.

8 *Merchants' National Bank*, 74 Mo. 77, affirming S. O. 6 Mo. App. 454.

9 *Newberry v. Detroit etc. Co.* 17 Mich. 141.

10 *Beckwith v. Burroughs*, 13 R. I. 294.

11 *Broadway Bank v. McElrath*, 13 N. J. Eq. 24; S. O. *sub nom.* *Hunterdon Bank v. Nassau Bank*, 17 N. J. Eq. 496; *Rogers v. Stevens*, 8 N. J. Eq. 167.

12 *Telford etc. Turnpike Co. v. Gerhab* (Supr. Ct. Penn. 1888); *Eby v. Guest*, 94 Pa. St. 160; *Fenney's Appeal*, 59 Pa. St. 398; *Commonwealth v. Watmouth*, 6 Whart. 117; *United States v. Vaughn*, 3 Binn. 394; 5 Am. Dec. 375.

13 *Continental National Bank v. Elliot National Bank*, 5 Fed. Rep. 369.

14 *Scott v. Pequonnock National Bank*, 13 Fed. Rep. 494. *Contræ*, *Williams v. Mechanics' Bank*, 5 Blatchf. 59. And see *Hazard v. Exchange Bank*, 26 Fed. Rep. 94: where certain shares of a corporation were transferred, but no record thereof was made as the by-laws required, and a creditor of the transferrer, with no notice of the transfer, and, in good faith, attached the shares and had them sold and transferred to a third party, it was held that a suit against the corporation for refusing to record the transfer to him could not be maintained by the former transferee.

15 Mass. Act of May 9th, 1884.

16 Md. Act of 1886, ch. 287; *Morton v. Graffin*, 68 Md. 545.

17 *Arden v. Arden*, 29 Ch. Div. 702; *Pickering v. Ilfrac. R'y Co.* Law R. 3 Com. P. 235; *Robinson v. Nesbitt*, Law R. 3 Com. P. 264; *Bevan v. Oxford*, 6 De Gex, M. & G. 492.

18 In the case of *Bank v. Whinney*, 11 App. C. 426; *Brown & Theobald's Railway Law*, 76.

19 *Kyle v. Montgomery*, 73 Ga. 337.

§ 377. (d). To protect the transferee from a fraudulent transfer of the same stock. — It has been held upon very high authority that registration is essential to protect a purchaser of stock certificates from a fraudulent transfer of the same stock by his vendor.¹ It is said that while as between the purchaser of the certificate and his vendor the absolute legal and equitable title passes by a delivery of the certificate with power of attorney to have registration made, yet that as between himself and the company he acquires only an equitable title, which is only ripened into a legal title when he presents himself to perform the acts required by the charter and by-laws in order to effect a transfer; that until these acts have been performed, the purchaser is not a stockholder; the legal title remains in the vendor so far as concerns the corporation and subsequent *bona-fide* purchasers who take by transfer duly made on the books of the company; and that hence a buyer in good faith of the person in whose name the stock stands on the corporate books, who takes a transfer in conformity to the charter or by-laws, permitted to be made by the authorized officer of the corporation, becomes vested with a complete title to the stock, and cuts off all rights and equities of the holder of the *stock itself*; that what other rights and equities he may possess is another question; but that if the transferee has taken in good faith and for value, the stock is gone beyond reach and beyond recall by the corporation.² This line of reasoning, however, is not in accord with the modern weight of authority, which guaranties to the holder of the certificate that no valid transfer of the stock represented thereby shall be made upon the corporate

records without the surrender of the certificate.³ And no person accepting a mere registration of his name as transferee upon the books of the company, and the issue of new certificates, as a fulfillment of a contract of sale, without requiring the surrender and cancellation of the old certificates, can properly claim to be a *bona-fide* purchaser. The very failure of his vendor to produce the certificates is notice to him of possible superior equities.⁴ Accordingly, the purchaser who has waived his right to have the old certificates delivered up cannot hold the company liable for damages in case he loses his stock by reason thereof.⁵

1 *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30. In *Cady v. Potter*, 55 Barb. 463, 468, J. R. transferred stock certificates to C. R., the transfer not being registered; J. R. then transferred the same stock to P. upon the books of the company, giving some excuse for the non-production of the certificates: *held*, that the transfer to P. being registered first was superior.

2 *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, 80, citing *Stebbins v. Phoenix Fire Ins. Co.* 3 Paige, 350; *Union Bank v. Laird*, 2 Wheat. 390; *Mechanics' Bank v. New York etc. R. R. Co.* 3 Kern. 621; *Bank of Utica v. Smalley*, 2 Cowen, 770; 14 Am. Dec. 528; *Gilbert v. Manchester Iron Co.* 11 Wind. 627; *Wilson v. Little*, 2 Const. 443, 447; 51 Am. Dec. 307; *Borgate v. Shortridge*, 31 Eng. L. & Eq. 58.

3 *Vide infra*, §§ 383, 384.

4 *Vide infra*, §§ 383, 384.

5 *Houston etc. R'y Co. v. Van Alstyne*, 56 Tex. 439; *Hall v. Rose Hill etc. Road Co.* 70 Ill. 673. *Cf.* *Shropshire etc. R'y & Canal Co. v. Queen*, Law R. 7 H. L. 493.

§ 378. (e). For the benefit and protection of the corporation.—Another object in requiring transfers of stock to be registered is for the information and protection of the corporation;¹ to inform the company with respect to the rights of any person claiming to be entitled to receive dividends,² or assuming to vote at corporate meetings;³ to give it an opportunity to assert any lien which it may have upon the stock by refusing to permit

registration until it be satisfied;⁴ to enable it to hold the transferee liable for the unpaid subscription upon the stock, and for calls thereof;⁵ for a transferee of shares of stock cannot be held liable either to the corporation or to its creditors, until he has been recognized as a stockholder,⁶ nor so long as his transferrer continues liable for the same indebtedness.⁷ But an unregistered transferee may become liable as a stockholder by an express or implied waiver of the formalities of registration.⁸

1 *Baldwin v. Canfield*, 26 Minn. 43.

2 *Vide supra*, § 305.

3 *Vide supra*, § 374. See also STOCKHOLDERS' MEETINGS.

4 *Vide infra*, § 339.

5 *Pullman v. Upton*, 96 U. S. 328; *Webster v. Upton*, 95 U. S. 63; *Upton v. Hansborough*, 3 Biss. 417; *Foreman v. Bigelow*, 4 Cliff 508. In re *South Mountain etc. Co.* 7 Sawyer, 39; *Moore v. Jones*, 3 Woods, 53; *Seymour v. Sturges*, 26 N. Y. 131; *Cole v. Ryan*, 52 Barb. 168; *Mann v. Currie*, 2 Barb. 294; *Bend v. Susquehanna Bridge Co.* 6 Har. & J. 128; 14 Am. Dec. 261; *Brigham v. Mead*, 10 Allen, 245; *Hartford etc. R. R. Co. v. Boorman*, 12 Conn. 520; *Evans v. Wood*, 37 Law J. Ch. 159; *Huddersfield Canal Co. v. Buckley*, 7 Term R. 36.

6 *Williams v. Hanna*, 40 Ind. 535; *Midland Counties R'y Co. v. Gordon*, 16 Mees. & W. 804.

7 *Williams v. Hanna*, 40 Ind. 535.

8 *Upham v. Burnham*, 3 Biss. 431; *Isham v. Buckingham*, 49 N. Y. 216; *Bernard's Case*, 5 De Gex & S. 283.

§ 379. **The formal requisites of registration of transfers.**—The usual method of transferring stock is by a written assignment made by the former owner, with a power of attorney to transfer it upon the books of the company, kept for that purpose. Upon the production of these papers to the transfer agent of the company, the nominated attorney makes the formal transfer, the old certificate is canceled, and a new certificate is issued to the new owner.¹ But the issue of a new stock certificate to the transferee upon registration of the transfer

is not necessary to complete the transaction.² If any purchaser prefers, instead of a new certificate, that an indorsement of the transfer shall be made upon the old certificate, his wish is to be complied with; and this indorsement, signed by the secretary of the company, is considered in every respect the same as a new certificate.³ The power of attorney must be signed by the last holder of the stock whose name is upon the corporate books. The company cannot recognize a power from any intermediate holder of the certificate.⁴ Assignments of stock in insolvency or bankruptcy are registered in the same manner as voluntary transfers.⁵

1 *Burrall v. Bushwick R. R. Co.* 75 N. Y. 211. But see *Green Mountain etc. Co. v. Dull*, 15 Ind. 1, where it is said that the officer having charge of the registry book is the proper person to make the transfer, unless otherwise provided by the by-laws.

2 *Chouteau Spring Co. v. Harris*, 20 Mo. 382; *First National Bank v. Gifford*, 47 Iowa, 575.

3 8 Vict. ch. 16, § 15.

4 *Dunn v. Commercial Bank*, 11 Barb. 530.

5 *State v. Ferris*, 42 Conn. 560; *Dutton v. Connecticut Bank*, 13 Conn. 493.

§ 380. **English statutory provisions in respect of registration of transfers otherwise than by contract.**—By the Companies' Clauses Act of 1845, it is provided that if the interest in any share has become transmitted in consequence of the death, or bankruptcy, or insolvency of any shareholder, or in consequence of the marriage of a female shareholder, or by any other lawful means than by a transfer according to the provisions of that act, or of the special act under which the company is chartered, the transmission shall be authenticated by a declaration in writing stating the name of the

person to whom the share has been transmitted and the manner in which his interest has been acquired, the declaration to be made and signed by some credible person before a justice or before a master, or master extraordinary, of the high court of chancery; that this declaration shall be left with the secretary of the company, who shall thereupon enter the name of the person entitled to the transmission in the register of shareholders; and that until the transmission shall be thus authenticated no person claiming by virtue thereof shall be entitled to vote upon the stock nor receive dividends thereon.¹ Under this section an infant may be registered.² It seems that an executor who assents to the registration of his testator's shares in his own name becomes personally liable. If he does not wish to have the shares transferred in his own name, a reasonable time ought to be allowed to him to find a purchaser.³ If the transmission be by virtue of the marriage of a female shareholder, it is required that the declaration described above shall contain a copy of the register of her marriage, or other particulars of the celebration thereof, and that it shall declare the identity of the wife with the holder of the share.⁴ And if the transmission have taken place by virtue of any testamentary instrument, or by intestacy, the probate of the will or the letters of administration, or an official extract therefrom, shall, together with the declaration, be produced to the secretary of the company, and upon the production thereof in either of the cases aforesaid the secretary shall make an entry of the declaration in the register of transfers.⁵ The company is not bound

to see to the execution of trusts in any of these cases of transmission. The receipt of the trustee in whose name the shares are registered, or if there be several trustees, the receipt of one of them, is a sufficient discharge to the company for any dividend or any sum of money payable in respect of the share, notwithstanding the trust, and whether or not the company have had notice of the trust, "and the company shall not be bound to see to the application of the money paid upon such receipt."⁶

1 8 Vict. ch. 16, § 18.

2 Cork etc. R'y Co. v. Cazenove, 10 Q. B. 935; Leeds etc. R'y Co. v. Fearnley, 4 Ex. 27.

3 Buchan's Case, 4 App. 533; Browne & Theobald's Railway Law, 74.

4 8 Vict. ch. 16, § 19.

5 8 Vict. ch. 16, § 19.

6 8 Vict. ch. 16, § 20. As to the obligation of the company under this section, with regard to equitable rights of which it has notice, see *Societe Generale de Paris v. Walker*, 14 Q. B. Div. 424; S. C. 12 App. C. 20; *Bradford Banking Co. v. Briggs etc. Co.* 31 Ch. Div. 19; S. C. 12 App. C. 29.

§ 381. Of the manner of effecting transfers prior to incorporation or issue of certificates, formal registration being impossible.—It is not essential to the valid transfer of shares of stock that certificates thereof should have been issued.¹ When no certificates of stock have been issued and a regular transfer cannot yet be made, a subscriber may convey his interest in the company by having his signature erased from the books and the name of his transferee inserted in its place.² And in such a case the transferee becomes liable and the transferrer is relieved from all liability to the same extent as if certificates had been issued and duly transferred.³ Thus, in a late case it was held that a person who has been substituted as a subscriber •

instead of another, and has acted as director, attended meetings and voted calls on stock, cannot deny his liability as a stockholder on the ground that there was no formal undertaking on his part to become a stockholder, and that there had been no registration of a transfer upon the corporate books.⁴ When, however, a subscriber before the incorporation of the company transfers his right to the stock which he has agreed to take, the company is not bound to recognize the transferee as a stockholder.⁵ Where a transferee of corporate stock signs a paper, which purports to be an original subscription, and enters into an express agreement to pay the amount subscribed as may be determined by the board of directors, he thereby incurs the liability of an original shareholder, and is liable for the amount of the unpaid subscription.⁶ If a subscriber transfers his shares before the certificates of stock have been issued to him, and, in accordance with his directions, they are issued to his transferee, this transferee becomes the original taker, and he is not entitled to stand upon the ground of a *bona-fide* purchaser without notice.⁷ But the mere fact that shares of corporate stock are issued directly to *bona-fide* purchasers thereof for value from the original holders, to whom they had been allotted but not issued, does not render the transferees original subscribers so as to subject them to liability to corporate creditors upon an overvaluation of the property received by the company from the original subscribers in payment of their subscriptions.⁸

¹ State v. Butler, 86 Tenn. 614; 4 R'y & Corp. Law J. 178, 180; Bank v. Bank, 105 U. S. 217.

2 *Ryder v. Alton etc. R. R. Co.* 13 Ill. 516.

3 *Burke v. Smith*, 16 Wall. 390; *Thorp v. Woodhull*, 1 Sand. Ch. 411; *Brigham v. Mead*, 10 Allen, 245. *Cf.* *Upton v. Burnham*, 3 Biss. 431, 520; *Midland Counties R'y Co. v. Gordon*, 10 Mees. & W. 804; *S. C. 5 R'y & Canal Cas.* 76.

4 *Weinman v. Wilkinsburg etc. R'y Co.* (1888), 118 Pa. 192.

5 *Hawkins v. Mansfield etc. Co.* 52 Cal. 513; *Morrison v. Gold Mountain etc. Co.* 52 Cal. 306. *Contra*, *Baltimore etc. R'y Co. v. Sewell*, 35 Md. 238; 6 Am. Rep. 402; *Merrimac etc. Co. v. Levy*, 54 Pa. St. 227.

6 *Citizens' etc. Co. v. Gillespie* (1887), 115 Pa. 564.

7 *In re Vulcan Iron Works*, Law T. 1885, p. 61; *Rowland's Case*, 42 Law T. N. S. 785; *Potter's Appeal*, W. N. 1878, p. 81; *Cook on Stock & Stockh.* § 50, *q. v.* for a lucid exposition of this whole subject. *Contra*, *Carling's Case*, 1 Ch. Div. 115.

8 *Young v. Erie Iron Co.* (1887) 65 Mich. 111; citing *Sanger v. Upton*, 91 U. S. 56, 60; *Steacy v. Little Rock etc. R. R. Co.* 5 Dill. 346, 373-377.

§ 382. Notification of transfer and demand of registration.—Either the transferrer¹ or the transferee² may insist upon registration being made, and, upon the refusal of the company to comply, enforce the right in equity. When the company does not keep a registration book, notification to it that the transfer has been made is held to constitute a registry.³ But when it does keep books for the registration of transfers, it need pay no attention to a mere notification that a transfer has been made.⁴ It is a sufficient demand for registration by the transferee to apply at the office of the company during the usual hours of business, and make his demand upon the officers or clerks who may be in attendance there; and, in case they are not authorized to attend to that particular business, they must either refer him to the proper officer, or procure the attendance of that officer, or of the board of directors, if necessary, without any unreasonable delay.⁵ In the absence of any proof to the contrary, it may be fairly presumed that the principal officer or clerk in attendance at the office, during the usual hours of business, is authorized to reg-

ister a transfer when proper.⁶ Where, however, it is prescribed by a by-law of the company that registration shall be made in the presence of a certain officer, it must be complied with.⁷

1 Johnston v. Laffin, 103 U. S. 800, 804; Webster v. Upton, 91 U. S. 65, 71; Eustace v. Dublin etc. R'y Co. Law R. 6 Eq. 182.

2 Johnston v. Laffin, 103 U. S. 800, 804; Cushman v. Thayer Manufacturing Co. 76 N. Y. 365; 22 Am. Rep. 315.

3 Crawford v. Providential Ins. Co. 8 Up. Can. C. P. 263.

4 Stockwell v. St. Louis etc. Co. 9 Mo. App. 133. See, however, Purchase v. New York Exchange Bank, 3 Rob. (N. Y.) 164.

5 Commercial Bank v. Kortright, 22 Wind. 348, 351; 34 Am. Dec. 317.

6 Commercial Bank v. Kortright, 22 Wind. 348, 351; 34 Am. Dec. 317. In Case v. Bank, 100 U. S. 446, an application to the cashier of a bank was considered sufficient. In Green Mountain etc. Co. v. Bulla, 45 Ind. 1, an application to the president was sustained. In Goodwin v. Ottawa etc. R'y Co. 13 Up. Can. C. P. 254, an application to a secretary and treasurer was held sufficient. In McMurrish v. Bond etc. Co. 9 Up. Can. Q. B. 333, application to a secretary was deemed sufficient.

7 Planters' etc. Ins. Co. v. Selma Savings Bank, 63 Ala. 585; Dane v. Young, 61 Me. 160.

§ 383. **Of the surrender of the old certificates.** It is essential to the protection of a corporation when called upon to register a transfer of shares of stock, that it require the surrender of the old stock certificates for cancellation; for the outstanding certificates may be fraudulently put upon the market by the transferrer, and their purchaser may hold the company liable for permitting the registration.¹ The purchaser of the stock certificates is told under the seal of the corporation that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know, that whoever in good faith buys the stock, and produces to the corporation the certificates, regularly assigned, with power of attorney to register the transfer, is

entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to anyone not in possession of the certificates.² The failure of the parties to the transfer to produce the certificates at the time, is notice to the company that a superior title may be in some third party.³ By thus interdicting corporations from transferring stocks on their books, except upon surrender of the certificate, or proof of its loss or destruction, the law surrounds those who take them with the safeguards it accords to the holders of other great agencies of commerce—bills, notes, bills of lading, *et cetera*.⁴ Even when the transferee demanding registration purchased the stock at an execution sale, the company should refuse to permit the transfer to be registered without the surrender of the old certificates. Otherwise, a *bona-fide* holder of the outstanding certificates, who purchased for value before the levy of the execution or attachment, may recover damages from the company for permitting registration to be made.⁵ If, however, it has refused to permit registration to be made and a judicial tribunal of competent jurisdiction of last resort, after a fair contest in good faith by the corporation, orders the stock to be transferred to the purchaser at the execution sale, the corporation cannot be held liable to the holder of the outstanding certificate who took no steps to protect himself.⁶

1 Moore v. Citizens' National Bank, 111 U. S. 156; Bank v. Lanier, 11 Wall. 369; Brisbane v. Delaware etc. R. R. Co, 94 N. Y. 204; Cushman v. Thayer Manuf. Co. 76 N. Y. 365; 32 Am. Rep. 315; New York etc. R. R. Co. v. Schuyler, 34 N. Y. 30, 81; State v. New Orleans etc. R. R. Co. 30 La. An. 303; Smith v. Crescent City etc. Co. 30 La. An. 1378; Strange v.

Houston etc. R. R. Co. 53 Tex. 162; Bridgeport Bank v. New York etc. R. R. Co. 30 Conn. 231; Cleveland etc. R. R. Co. v. Robbins, 26 Ohio 54. 423. *Cf.* Hart v. Frantino etc. Co. Law R. 5 Ex. 111. *Contra*, Shropshire etc. R'y & Canal Co. v. Queen, Law R. 7 H. L. 426, 509; Houston etc. R'y Co. v. Van Alstyne, 46 Tex. 439; Hall v. Rose Hill etc. Road Co. 79 Ill. 673.

2 Lanier v. First National Bank, 11 Wall. 277; Brisbane v. Delaware etc. R. R. Co. 25 Hun, 436.

3 Strange v. Houston etc. R. R. Co. 53 Tex. 162.

4 Factors' etc. Ins. Co. v. Marino etc. Co. 31 La. An. 142.

5 Hazard v. National Exchange Bank, 96 Fed. Rep. 94; *Smith v. American Coal Co.* 7 La. 317. *Cf.* St. Louis etc. R'y Co. v. Wilson, 114 U. S. 60; Rogers v. Stevens, 8 N. J. Eq. 167.

6 Friedlander v. Slaughter House Co. 31 La. An. 523; National Bank v. Lake Shore etc. R. R. Co. 21 Ohio 54. 271. *Cf.* State v. Warren etc. Co. 22 N. J. 43; Chapman v. New Orleans etc. Co. 4 La. An. 153.

§ 334. The same subject, continued.—The non-production and non-surrender of the certificate at the time of the transfer is not fatal to the title of the transferee. It is only essential to the safety of the corporation, and may be waived at its peril. The company having the means of knowing whether a certificate of particular stock is outstanding or not, and the power to compel its return and cancellation before any transfer is made, will be liable to a purchaser of a certificate of stock for allowing his vendor to transfer upon the corporate books the same stock to another subsequent purchaser, in contravention of its by-laws requiring a surrender and cancellation,¹ upon the ground that by such a by-law the corporation courted and established privity between itself and every holder of the certificate by asserting "that his equitable title was safe, because nobody but he could transfer the legal title;"² and upon the further ground that as the law supposes that the corporation promises or undertakes to do its duty, and subjects it to answer in a proper action for its defaults, whether of non-feasance or misfeasance,³ so much the more is the cor-

poration liable to the holder of the certificate, if its transfer agent had actual knowledge of the fact that the stock had already been once sold.⁴

1 *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, 81, 82. *Acc. Pollock v. National Bank*, 7 N. Y. 274; 8/ Am. Dec. 820; *Davis v. Bank of England*, 2 Bing. 393; *Ashby v. Blackwell*, 2 Eden Ch. 299.

2 *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, 83; *Kortwright v. Buffalo Commercial Bank*, 20 Wend. 91.

3 *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, 83, 84; *Kortwright v. Buffalo Commercial Bank*, 20 Wend. 91, 94; *The King v. The Bank of England*, Doug. 523.

4 *Bridgeport Bank v. New York etc. R. R. Co.* 30 Conn. 270; *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, 84.

§ 385. In what books transfers may be recorded. In England, the deed of transfer, when duly executed, must be delivered to the secretary of the company, whose duty it is to keep it and to enter a memorial thereof in a book called the "register of transfers," and to indorse this entry upon the deed of transfer. The company is entitled to a small fee for registration.¹ But in America it is not essential that the company should set apart a book exclusively for the registration of transfers. All that is necessary, when the transfer is required by law to be made upon the books of the company, is that the fact should be appropriately recorded in some suitable registry or stock list, or otherwise formally entered upon its books. For this purpose the account in a stock ledger, showing the names of the stockholders, the number and amount of the shares belonging to each, and the sources of their title, whether by original subscription and payment or by derivation from others, is quite suitable and fully meets the requirements of the law.² Thus, in a late case in Alabama, under a statute providing that no transfer shall be valid as against *bona-fide* creditors

and subsequent purchasers, "except from the time such transfer shall have been registered or made upon the book or books of such company,"² a memorandum in the stub book from which the new certificates were cut, was considered a sufficient registration, where the company kept no other registry of transfers and had no by-law regulating the manner of registration.⁴

1 2 s. 6 d. unless otherwise prescribed in a special act. 8 Vict. ch. 16, § 15.

2 National Bank v. Watsontown Bank, 105 U. S. 217. See Preston v. Culler (1888), 64 N. H. 461.

3 Ala. Code, §§ 2041, 2044.

4 Fisher v. Jones, 82 Ala. 117.

§ 386. Registration dates only from the actual entry upon the books.—Where it is required that transfers be registered upon the corporate books, a transfer will not be deemed to have been registered without its having been actually entered upon the books.¹ Thus, it will not be construed as an actual registration for the registry clerk to write upon the papers the words, "received for record;"² nor will a mere entry of credit to the transferee on the treasurer's books amount to a registration;³ nor will registry at a branch office in another State operate as a registration until entered in the books at the principal office;⁴ nor will leaving the old certificates with the corporate officers, with the request that the transfer be made.⁵

1 McCurry v. Suydam, 10 N. J. 245.

2 Norton v. Curtis, 5 Conn. 246.

3 Marlborough Manufacturing Co. v. Smith, 2 Conn. 572.

4 Pinkerton v. Manchester etc. R. R. Co. 42 N. H. 424.

5 Brown v. Adams, 5 Biss. 181.

§ 387. Waiver of formal registration.—The corporation may waive the formalities of registra-

tion;¹ as, for example, by paying dividends to an unregistered transferee,² or by placing the transferee's name upon the list of stockholders.³ Thus, it has been held that entries in the dividend book and in the ledger of the company, showing that dividends had been paid to transferees of stock whose names had never been entered in the registration book, taken together with the fact that they had become officers of the company, was a sufficient recognition of them as stockholders to release their transferrers from liability to corporate creditors.⁴ And after the company has once recognized the transferee as a shareholder, it cannot avail itself of informalities in the transfer or registration thereof, for the purpose of holding the transferrer liable for calls.⁵

1 *Isham v. Buckingham*, 49 N. Y. 216; *Weber v. Fukey*, 58 Md. 600, 516; *Ex parte Walton*, 28 Law J. Ch. 545; *Baine v. Whitehaven R. y. Co.* 3 H. L. Cas. 1; *Clowes v. Brettell*, 11 Mees. & W. 461; *Walter's Case*, 3 De Gex & S. 149; *Sedler's Case*, 3 De Gex & S. 36.

2 *Cutting v. Damerel*, 88 N. Y. 410.

3 *Upton v. Burnham*, 3 Biss. 431, 520.

4 *Cutting v. Damerel*, 88 N. Y. 410. *Of. Johnson v. Underhill*, 88 N. Y. 203; *Bosanquet v. Shortridge*, 4 Ex. 699.

5 *Upton v. Burnham*, 3 Biss. 431, 520; *Cutting v. Damerel*, 88 N. Y. 410; *Isham v. Buckingham*, 49 N. Y. 216; *Strange v. Houston etc. R. R. Co.* 53 Tex. 162; *Murray v. Bush*, Law R. 6 H. L. 37; *Bargate v. Shortridge*, 5 H. L. Cas. 297.

§ 388. **When the company may refuse registration.**—The directors of the company have no power to refuse to permit a transfer of stock to be made, unless they be expressly vested with a discretion in respect thereof by the charter or articles of association.¹ As has been said by an eminent jurist, such a power is so capable of abuse and so foreign to all received notions and to the universal practice and mode of dealing in stocks, that it cannot, in the

absence of legislative expression, be held to exist.² The directors are, however, sometimes vested with a discretion in the matter by the articles of association.³ Even then, however, the courts will inquire whether their power has been reasonably exercised.⁴ Registration of a transfer cannot be refused on the ground that there was no consideration therefor;⁵ nor because the company has been notified by a claimant of the stock not to permit the registration to be made.⁶ Under the Married Women's Property Act of 1870,⁷ a company was bound to register shares in the name of a married woman to whom they had been transferred, unless it could show a flaw in her title.⁸ Delivering a defective deed of transfer to the secretary does not entitle the purchaser to registration until the defect is remedied.⁹ By the Companies' Clauses Act of 1845, the closing of the transfer books for a prescribed time¹⁰ before each ordinary meeting, is declared lawful upon giving seven days' notice by newspaper advertisement; and the effect of the closing is declared to be that "any transfer made during the time when the transfer books are so closed shall, as between the company and the party claiming under the same, but not otherwise, be considered as made subsequently to such ordinary meeting."¹¹ After a winding-up order has been made, it is the duty of the company to refuse registration of transfers.¹²

1 Johnson v. Laffin, 5 Dill. 65, 70; S. C. 103 U. S. 800; Chappell's Case, Law R. 6 Ch. App. 902; Gilbert's Case, Law R. 5 Ch. App. 955; Weston's Case, Law R. 4 Ch. App. 20; In re Stranton etc. Co. Law R. 16 Eq. 559.

2 Johnson v. Laffin, 5 Dill. 65, 78, per DILLON, J.

3 Bargate v. Shortridge, 5 H. L. Cas. 297; Shortridge v. Bosanquet, 16 Beav. 84.

4 Moffatt v. Farquhar, 7 Ch. Div. 591; Robinson v. Chartered Bank, Law R. 1 Eq. 32. But see *ex parte Penny*, Law R. 8 Ch. 446, holding that

67 a directors may refuse to give their reasons for refusal, and that it will then be presumed that their reasons were sufficient.

5 *Hahn v Swiggett*, 12 Ind. 194.

6 *Ex parte Sargent*, Law R. 17 Eq. 273.

7 33 & 34 Vict. ch. 23, § 4.

8 *Regina v Carnatic R'y Co.* Law R. 3 Q. B. 299.

9 *Nauney v Morgan*, 35 Ch. Div. 592.

10 For fourteen days, unless otherwise provided by the special act of incorporation.

11 5 Vict. ch. 14, § 17.

12 *Mitchell's Case*, Law R. 4 App. C. 542; *Chappell's Case*, Law R. 4 Ch. App. 247; *Weston's Case*, Law R. 4 Ch. App. 686; *Ex parte Parker*, Law R. 2 Ch. 645.

§ 389. The same subject, continued.—The corporate lien for debts of the transferrer.—The company cannot refuse to register a transfer of stock upon the ground that the transferrer is indebted to it,¹ for at common law it has no lien upon the shares of its stockholders to secure the payment of debts.² In many cases, however, a lien has been created by statute,³ or by the corporate charter,⁴ or by a by-law of the company,⁵ or by an agreement between the shareholders,⁶ or by usage, known to the transferrer and transferee.⁷ All persons are affected with knowledge of a lien upon the stock created in favor of the corporation by charter or by statute,⁸ whether it be set forth in the certificate or no.⁹

1 *Driscoll v West Bradley etc. Co.* 69 N. Y. 94; *Mobile Mutual Ins. Co. v. Cullom*, 49 Ala. 558; *Steamship Dock Co. v. Heron*, 52 Pa. St. 286; *Farmers' etc. Bank v. Wason*, 49 Iowa, 336, 31 Am. Rep. 526; *Williams v. Lowe*, 4 Neb. 382, 536, *Taylor on Corporations*, § 600.

2 *Neale v Janney*, 2 Cranch, 138; *Bates v. New York Ins. Co.* 3 Johns. Cas. 238; *Dana v. Brown*, 1 Marsh. J. J. 344; *Dyson v. Carter*, 21 La. An. 96; *Massachusetts Iron Co. v. Hooper*, 7 Cuah. 183; *Steamship Dock Co. v. Heron*, 52 Pa. St. 286; *Peop. v. Cretchett*, 9 Cal. 112; *Williams v. Lowe*, 4 Neb. 382, 536; *McMurrich v. Lord Head Harbour Co.* 9 Up. Can. Q. B. 333.

3 In New York, the General Railroad Act of 1850, ch. 140, § 8, provides, that "no share shall be transferable until all previous calls thereon shall have been fully paid in." See, also, *National Bank v. Watertown Bank*, 105 U. S. 217; *Allen v. Montgomery R. R. Co.* 11 Ala. 437, 451; *Pittsburg etc. R. R. Co. v. Clarke*, 21 Pa. St. 146; *Ewerhart v. West Chester R. R. Co.* 23 Pa. St. 33; *Rogers v. Livingston Bank*, 12 Serg. & R. 77; *Eyder v. Al-*

ton etc. R. R. Co. 13 Ill. 516; New York Laws 1881, ch. 468, § 12; *Gaff v. Fleisher*, 33 Ohio St. 107.

4 *Leggett v. Bank of Sing Sing*, 24 N. Y. 283; *German Security Bank v. Jefferson*, 10 Bush, 326; *Bradford Banking Co. v. Briggs*, 31 Ch. Div. 149, reversing S. C. 29 Ch. Div. 119.

5 *Spurlock v. Pacific R. R. Co.* 61 Mo. 319. See, also, *Knight v. Old National Bank*, 3 Clifford, 423; *In re Bachman*, 12 Nat. Bank. Reg. 223; *Pendergas v. Bank of Stockton*, 2 Sawyer, 108; *Bank of Holly Springs v. Pinson*, 58 Miss. 421; 38 Am. Rep. 330; *McDowell v. Bank*, 1 Har. (Del.) 27; *Mechanics' Bank v. Merchants' Bank*, 45 Mo. 513; 100 Am. Dec. 388; *St. Louis etc. Ins. Co. v. Goodfellow*, 9 Mo. 149; *People v. Crockett*, 9 Cal. 112; *Child v. Hudson's Bay Co.* 2 P. Wms. 207; *Cook on Stock & Stockh.* § 522, and many banking and insurances cases there cited.

6 *Vausands v. Middlesex County Bank*, 26 Conn. 144.

7 *Morgan v. Bank of North America*, 8 Serg. & R. 73, 88; S. C. 11 Am. Dec. 575.

8 *Union Bank v. Laird*, 2 Wheat. 390; *Bank of Utica v. Smalley*, 2 Cowen, 770; 14 Am. Dec. 526; *St. Louis etc. Ins. Co. v. Goodfellow*, 9 Mo. 149; *Bohmer v. City Bank*, 77 Va. 445; *Bishop v. Globe Co.* 133 Mass. 132; *Grant v. Mechanics' Bank*, 15 Serg. & R. 140; *Downer v. Zanesville Bank*, Wright (Ohio), 477.

9 *McCready v. Rumsey*, 6 Duer, 594.

§ 390. The same subject, continued—Of by-laws creating a lien.—A lien upon stock for the debts due the corporation from the shareholder, may be created by the charter or statute directly, by express language to that effect, or it may be done indirectly, by conferring upon the company power to adopt by-laws for the regulation of its affairs and the transfer of its stock.¹ But it has been held that charter or statutory authority to pass by-laws regulating the conduct of the corporate "affairs," nothing being said about the transfer of stock, does not confer the power to make a by-law subjecting the transfer of shares to the lien of the company.² In Massachusetts it has been doubted,³ and even entirely denied, that the company can, by means of a by-law, in any way limit the free transfer of stock.⁴ In New Hampshire such restrictions are forbidden by statute.⁵ And it remains doubtful whether the corporation may create

a lien by by-law, in the absence of express or implied authority in its charter or in some statute of the State.⁶ A lien created by a by-law, in order to be effective, must be brought to the knowledge of the transferee.⁷ The authorities are not agreed as to whether a notice upon the face of the certificate, that the stock thereby represented is subject to all debts due the company from the owner thereof, will suffice to bind a purchaser in the absence of a charter or statutory lien.⁸ A lien created by by-law is inoperative as against the judgment creditors of the stockholder;⁹ it will be superior, however, to the title of the stockholder's assignee in bankruptcy.¹⁰ The rights of a transferee cannot be affected by a by-law passed after the transfer was made.¹¹

1. *Brant v. Bank of Washington*, 10 Peters, 694, 611, *Pendergast v. Bank of Stockton*, 2 Sawyer, 109, *Cunningham v. Alabama etc. Trust Co.*, 4 Ala. 687; *Spartan v. Pacific R. R. Co.* 61 Mo. 319; *Byron v. Carter*, 22 La. An. 99; *Taylor on Corporations*, § 801. C/ *Tuttle v. Walton*, 1 Ga. 43.

2. *Delaware etc. R. R. Co. v. Oxford Iron Co.*, 20 N. J. Eq. 340, and the register & notes thereto.

3. *Plymouth Bank v. Bank of Norfolk*, 10 Pick. 454; *Hornith v. Worthington Bank*, 6 Pick. 394.

4. *Sargent v. Franklin Ins. Co.* 5 Pick. 99; 19 Am. Dec. 293.

5. *N. H. Laws of 1868*, ch. 380, § 2.

6. See *Angell & Ames on Corporations* (10th ed.) §§ 325, 326; 1 *Potter's Corporations*, §§ 267-269; *Field on Corporations*, §§ 136-138; *Green's Eriess' Ultra Vires*, 2nd ed. 14, note; *Morse on Banking* (2nd ed.), 355; *Overton on Loans*, §§ 42-44.

7. *Driscoll v. West Bradley etc. Co.*, 20 N. Y. 24, 149; *In re Long Island R. R. Co.*, 19 Wend. N. 21 Am. Dec. 429; *Bank of Holly Springs v. Pinner*, 20 Min. 431; 20 Am. Rep. 339; *Planters' etc. Ins. Co. v. Santa Savings Bank*, 43 Ala. 594; *Petot v. Johnson*, 13 La. An. 1268; *Byron v. Carter*, 22 La. An. 99; *Steamship Dock Co. v. Heron*, 98 Pa. 91, 39; *Anglo-Californian Bank v. Granger Bank*, 43 Cal. 259; *Moravets on Corporations* (2nd ed.) § 293. C/ *Wade v. Janney*, 2 Cranch, 169; *Evansville National Bank v. Metropolitan National Bank*, 3 Ill. 907; *Lee v. Citizens' National Bank*, 2 Cal. Super Ct. 398.

8. In New York it is held insufficient. *Cookin v. Second National Bank*, 45 N. Y. 614. Contra, in Connecticut. *Vannada v. Middlesex County Bank*, 26 Conn. 144.

9. *Byron v. Carter*, 22 La. An. 99.

10. *In re Siglow*, 1 Fed. Bank. Rep. 691, also 697; *Morgan v. Bank of North America*, 8 Serg. & R. 72; 5 C. 11 Am. Dec. 676.

11. *Peoples v. Crockett*, 9 Cal. 112.

§ 391. Extent of the corporate lien.—The general rule.—Unless expressly restricted to a certain class of debts, a statutory lien covers all debts owing from the shareholder to the corporation;¹ debts of every name and nature, due and to become due—whether contracted before or after the stockholder became a member of the corporation—whether the liability be personal to the shareholder or only as surety, and extends to debts due from a partnership of which the shareholder is a member, and to debts barred by the statute of limitations.² The lien attaches for unpaid calls on the original subscription,³ and not only to the shares but also to the dividends thereon,⁴ although the statute or charter only specifies “shares and stock.”⁵ The statutory lien is binding as to the creditors and assignees in insolvency of the shareholder, and also as to persons who purchase shares from prior holders or take them as collateral security.⁶ Thus, in a late case in Ohio, where a shareholder, who was indebted to the corporation, pledged his shares to secure a debt to a third party, and delivered them with an absolute power to sell and to demand a transfer on the books of the corporation, it was held that in the absence of any exercise of this authority on the part of the pledgee, the corporation might attach the interest of the shareholder, enforce a sale, and retain the surplus left after the discharge of the pledgee’s claim, such attachment taking priority over a later attachment by another creditor by service on the pledgee of garnishee process.⁷ Under the Companies Act of 1862, when a company was by its articles of association entitled to a lien upon the shares of a shareholder for all debts owing

by him to the company, it was held that the company's lien attached even to shares held by a trustee, and had priority as against the *cestui que trust*.⁸

1 Taylor on Corporations (2nd ed. 1889), § 604.

2 Cook on Stock & Stockh. § 527, and cases there cited. Many of the questions relating to the lien of the corporation upon the shares of its members have never arisen with respect to railway companies, and from the nature of these enterprises are not likely to arise. For a full discussion of the subject, *vide* Cook on Stock & Stockh. etc. §§ 521, 533.

3 *Spurlock v. Pacific R. R. Co.* 61 Mo. 319; *Pittsburgh etc. R. R. Co. v. Clarke*, 23 Pa. St. 146; *Shaw v. Rowley*, 5 Eng. R'y & Canal Cas. 47. *Cf.* *Newry etc. R'y Co. v. Edmunds*, 2 Ex. 118; *Ambergate etc. R'y Co. v. Mitchell*, 4 Ex. 540; *Great North. etc. R'y. Co. v. Biddulph*, 7 Mees. & W. 243.

4 *Stebbins v. Phoenix Fire Ins. Co.* 3 Paige, 350; *Bates v. New York Ins. Co.* 3 Johns. Cas. 238; *Grank v. Mechanics' Bank*, 13 Serg. & R. 140; *Sargent v. Franklin Ins. Co.* 8 Pick. 90; 19 Am. Dec. 306.

5 *Hague v. Dandeson*, 2 Ex. 147, and cases cited *supra*; Cook on Stock & Stockh. § 523. *Cf.* *Hagar v. Union National Bank*, 63 Me. 539.

6 Taylor on Corporations (2nd ed. 1889), § 603.

7 *Norton v. Norton*, 43 Ohio St. 509.

8 *Browne & Theobald's Railway Law*, 75, citing *New London etc. Bank v. Brocklebank*, 21 Ch. Div. 302.

§ 392. **Extent of the corporate lien**—The general rule, continued.—The lien, when established, attaches to all of the stockholders' shares, although the debt may be for calls due and unpaid upon only a part of them.¹ This also is the statutory rule in England under the Companies' Clauses Act of 1845, which declares that no shareholder shall be entitled to transfer any share after any call shall have been made in respect thereof, until he shall have paid such call, nor until he shall have paid all calls for the time being due on every share held by him;² the meaning of which is held to be, that the company may refuse to execute a transfer of shares while a call remains unpaid, and not merely that the transferrer remains liable to pay the call.³ In America, also, it is held that the company may

refuse to permit registration until the lien has been satisfied;⁴ even in the case of a *bona-fide* purchaser at execution sale;⁵ and that it cannot be compelled to register so many of the shares as are in excess of the amount of the debt.⁶

1 *Stebbins v. Phoenix Fire Ins. Co.* 3 Paige, 350; *Cook on Stock & Stock*, § 528. *Contra*, only to those shares upon which the call is made: *Shenandoah Valley R. R. Co. v. Griffith*, 76 Va. 913; *Hubbersty v. Manchester etc. R'y Co.* Law R. 2 Q. B. 471.

2 8 Vict. ch. 16, § 16.

3 *Regina v. Wing*, 17 Q. B. 645; *S. C. nom. Hall v. Norfolk etc. Co.* 21 Law J. Q. B. 94; *S. O.* 16 Jur. 149. Under this statute a call is deemed to be made when the resolution ordering it is passed, and not when notice of it is given: *Regina v. Londonderry etc. R'y Co.* 13 Q. B. 99S; *Ex parte Tooke*, 18 Law J. Q. B. 343. See further, upon the construction of statutes prohibiting transfers while calls remain unpaid, *In re British Provident etc. Society*, 32 Law J. Ch. 633.

4 *Brint v. Bank of Washington*, 10 Pet. 596; *McCready v. Bumsay*, 6 Duer, 574.

5 *Newbury v. Detroit etc. R. R. Co.* 17 Mich. 141.

6 *Pierson v. Bank of Washington*, 3 Cranch, 363; *Sewall v. Lancaster Bank*, 17 Serg. & R. 285.

§ 393. **Extent of the corporate lien—modifications of the general rule.**—The strict general rule as laid down by the authorities cited in the preceding section, is modified by other decisions, and, in some particulars, entirely denied. Thus it is held, that no lien exists upon the shares of an unregistered transferee for debts due from him to the company;¹ that the lien does not extend to debts contracted after the company has received notification of the transfer;² that a shareholder is entitled to transfer shares on which all calls have been paid, although he may be the holder of other shares upon which a call has been made;³ that the company has no priority of lien over an equitable incumbrancer, who advanced money on a deposit of the certificates, with notice to the company, before the debt to the company became due;⁴ that the lien does not

extend to the unpaid balance of the subscription price not yet called;¹ that the transferee, by agreeing to conform to the regulations of the corporation, and by making a tender of the sum due on the subscriptions, with interest, may sue in a court of equity, to enforce an issue to him of a certificate of stock.² So also, in a case decided lately in Wisconsin, under the statute in that State creating a lien upon all the stock for debts due the company from the shareholder,³ it was held that the purchaser of shares upon which a portion of the subscription remained unpaid, is, notwithstanding the lien, entitled to registration of the transfer, the lien of the company upon the stock not being thereby destroyed.⁴ But other authorities hold that the lien is destroyed as against a purchaser of stock for value, not having notice either from the face of the certificate or otherwise, that the subscription price had not been paid.⁵ Under a statutory provision declaring the purchaser of shares of stock liable for any unpaid balance thereon,⁶ a conveyance in trust to sell to anyone agreeing to assume the subscriber's indebtedness to the company, does not render the trustee liable as a purchaser, within the meaning of the statute.⁷

1 *Heim v. Swiggett*, 12 Ind. 194.

2 *Conant v. Seneca County Bank*, 1 Ohio St. 325. See, however, *Union Bank v. Laird*, 2 Wheat. 390.

3 *Hubberty v. Manchester etc. Ry. Co.* Law R. 2 Q. B. 58, 471.

4 *Bradford Banking Co. v. Briggs etc. Co.* 31 Ch. Div. 18; S. C. 12 App. C. 25. See also *Miles v. New Zealand etc. Co.* 32 Ch. Div. 265.

5 *Hall v. United States Ins. Co.* 5 Gill. 494; *Kahn v. Bank*, 70 Mo. 202. See, however, *In re Bachman*, 12 Nat. Bank. Reg. 223.

6 *Iron R. R. Co. v. Fink*, 41 Ohio St. 321; S. C. 53 Am. Rep. 34.

7 Wis. Rev. Stat. § 1751.

8 *Herdegen v. Cotzhausen*, 70 Wis. 508.

9 *West Nashville etc. Co. v. Nashville Savings Bank*, 37 Tenn. 302; *Baskin v. Lowenstein*, 53 Mo. 301.

10 Oregon Miscel. Laws, ch. 72, § 3230.

11 *Powell v. Willamette Valley R. R. Co.* 15 Oregon, 393.

§ 394. **The lien enforceable for the benefit of the company alone.**—This lien can be enforced for the benefit of the corporation only.¹ Thus, in a recent case it was decided, that although certificates of stock refer to the charter, in which is a provision that no sale or transfer shall be made without first giving the corporation sixty days' notice of the proposed sale and allowing the company or its members the option to purchase on the same terms, this will not operate to enable the creditors of a stockholder to attack the validity of a pledge of the stock made by a mere delivery of the certificates, without registration or notification to the company.² But a surety who has paid a shareholder's debt to the corporation may be subrogated to the company's lien upon the stock.³

1 *Bank of Utica v. Smalley*, 2 Cow. 770; 14 Am. Dec. 536; *Cross v. Phoenix Bank*, 1 R. I. 39; *White's Bank v. Toledo etc. Ins. Co.* 12 Ohio St. 601. But see *Petersburg Savings etc. Co. v. Lumsden*, 75 Va. 327; *Hardcastle v. Commercial Bank*, 1 Har (Del.) 374, n.; *Klopp v. Lebanon Bank*, 46 Pa. St. 88; *Kuhns v. Westmoreland Bank*, 2 Watts, 136.

2 *Crescent City etc. Co. v. Deblieux* (1888), 40 La. Ann. 166.

3 *Hardcastle v. Commercial Bank*, 1 Har (Del.) 374, n.; *Hodges v. Planters' Bank*, 7 Gill & J. 808, 310; *Young v. Vough*, 23 N. J. Eq. 335; *Klopp v. Lebanon Bank*, 46 Pa. St. 88; *West Branch Bank v. Armstrong*, 40 Pa. St. 278.

§ 395. **Waiver of corporate lien.**—The lien being solely for the benefit of the corporation, it is of course competent to waive it.¹ Permitting registration of the transfer and issuing new certificates to the transferee is deemed a waiver of the lien.² And when a transfer is registered, notwithstanding a statute or a by-law of the company providing that no transfer shall be made until all calls due

If we have been paid, the transferee incurs no liability thereby;¹ and the transferrer also is released.² Taking additional security will not, however, be construed as a waiver of the lien;³ nor is a mere failure to assert a lien created by charter or statute, and set forth on the face of the certificate, to be regarded as a waiver thereof;⁴ nor will a waiver of the lien as to part of the shares be considered a waiver as to all.⁵

1 *National Bank v. Watertown Bank*, 105 U. S. 217; *In re Hoyleke R'y Co.* Law R. 9 Ch. 257, 259.

2 *Hill v. Paine River Bank*, 45 N. H. 300; *In re Northern Assam Tea Co.* Law R. 13 Eq. 453; *Higgs v. Assam Tea Co.* Law R. 4 Ex. 387; *In re Hoyleke R'y Co.* 9 Ch. 257.

3 *In re Bachman*, 12 Nat. Bank. Reg. 223; *McCready v. Rumsey*, 6 Duer. 574, *Watson v. Eales*, 23 Beav. 294.

4 *In re Hoyleke R'y Co.* 9 Ch. 257.

5 *Union Bank v. Laird*, 2 Wheat. 390.

6 *McCready v. Rumsey*, 6 Duer. 574; *Reese v. Bank of Commerce*, 14 Md. 271; 71 Am. Dec. 536; *Hoffman etc. Co. v. Cumberland etc. Co.* 16 Md. 456; 77 Am. Dec. 311, *First National Bank v. Hartford etc. Ins. Co.* 45 Conn. 22.

7 *First National Bank v. Hartford etc. Ins. Co.* 45 Conn. 22. *Contra*, *Presbyterian Congregation v. Carlisle Bank*, 5 Pa. 84, 345.

§ 396. The company entitled to a reasonable time for investigation. — It is the duty of the officers of the company having the custody of its stock books to see that all transfers of shares are properly made, either by the stockholders themselves or by persons having authority from them. Accordingly, if upon the presentation of a certificate for transfer, they are at all doubtful of the identity of the party offering it, or are unsatisfied as to the genuineness of the power of attorney produced, they can require the identity of the party in the one case, and the genuineness of the document in the other, to be satisfactorily established, before allowing the transfer to be made,¹ taking a reason-

able time to make inquiries and to investigate the proof.² But the company is liable in damages to the transferee for an unreasonable delay to register.³ An unexplained delay of more than one day has been held an unreasonable time.⁴ If the officers remain unsatisfied as to the genuineness of the power of attorney, they may require the presence of the stockholder himself.⁵

1 *Telegraph Co. v. Davenport*, 97 U. S. 369; *Davis v. Bank of England*, 2 E.ing. 393.

2 *Bayard v. Farmers' etc. Bank*, 52 Pa. St. 232; *Societe Generale de Paris v. Walker*, 11 App. C. 21, 41; *Colonial Bank v. Whinney*, 11 App. C 426

3 *Catchpole v. Ambergate etc. R'y Co.* 1 El. & B. 111.

4 *Sutton v. Bank of England*, 1 Craig & P. 193.

5 *Telegraph Co. v. Davenport*, 97 U. S. 369; *Mechanics' Banking Association v. Mariposa Co.* 3 Rob. (N. Y.) 335; *Davis v. Bank of England*, 1 Bing. 363.

§ 397. The corporation may refuse registration to both of two claimants—Interpleader. Where there is reasonable ground for doubt as to which of two claimants of stock is entitled to registration, the company may refuse to register either; and upon an action against it for this refusal, it may interplead, and thus compel the claimants to ascertain their rights through the medium of the courts;¹ and the corporation will be protected in registering a transfer in obedience to a decree of court.² But notice of an equitable claim given a company is effectual only for a reasonable time, and operates only as a notice not to allow registration of a transfer without giving the claimant an opportunity to establish his right.³ Accordingly, if the rights of one claimant are reasonably clear, the corporation should not by an absolute denial of registration compel him to bring suit, but

should merely suspend action for a limited time in which to allow the other contesting party to institute his action, and if he fails so to do, then registration should be granted to the former;⁴ for the courts will not grant the interpleader upon a mere pretext of a conflicting claim.⁵ As between two unregistered purchasers of the same shares, the one holding the certificates has priority.⁶ If by reason of an injunction a corporation is unable to allow registration to be made, it is nevertheless bound to respect the rights of a transferee who gives it notice of the transfer.⁷ There can be no interpleader after registration has once been allowed.⁸

1 *Leavitt v. Fisher*, 4 Duer, 1; *Mechanics' Bank v. Richards*, 74 Mo. 77; *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 100; *Cook on Stock & Stockh.* § 387.

2 *Purchase v. New York Exchange Bank*, 3 Rob. (N. Y.) 164; *Chapman v. New Orleans etc. Co.* 4 La. An. 153.

3 *Societe Generale de Paris v. Tramways Union Co.* 14 Q. B. 424, 448; *Bradford Banking Co. v. Briggs*, 12 App. C. 29.

4 *Townsend v. McIver*, 2 S. C. (N. S.) 25; *Cook on Stock & Stockh.* § 387.

5 *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 82.

6 *Maybin v. Kirby*, 4 Rich. Eq. 105; *Societe Generale de Paris v. Tramways Union Co.* 14 Q. B. 424, affirmed in *Law R.* 11 H. L. 20. *Cf. Crawford v. Dox*, 5 Hun, 507.

7 *Purchase v. New York Exchange Bank*, 3 Rob. (N. Y.) 164; *Cook on Stock & Stockh.* § 383.

8 *Dalton v. Midland R'y Co.* 11 Com. B. 458.

§ 398. **Whether the company may inquire into the purpose of the transfer.**—Ordinarily the corporation cannot refuse to register a transfer on account of objection to the intention of the transferer in making it.¹ For example, there is no equity to prevent the transfer of shares to a nominee to increase voting power.² But there is no such absolute right to dispose of their stock vested in the shareholders of a railway company as will enable

them to sell it to another company notwithstanding an injunction granted to prevent the latter company from obtaining control of the former.³ Where the president of a company, who owned a majority of its shares, contracted to sell them and to resign his office for the purpose of enabling his purchasers to acquire control of the corporate affairs, it was said by the court that, inasmuch as those who have the largest interests in corporations may control them, it was unable to see that any policy of the law was thereby violated, or that upon the evidence any wrong was thereby done to anyone.⁴ Where the undertaking has been virtually abandoned, and a portion of the subscriptions have been returned to shareholders, a purchaser with notice of these facts, whose good faith in becoming a shareholder is questionable, is not entitled to registration.⁵

1 *Townsend v. McIver*, 2 S. C. 25; *Moffatt v. Farquhar*, 7 Ch. Div. 591, where it was supposed that the purpose of the transfer was to increase the votes of the transferee.

2 *Moffatt v. Farquhar*, 7 Ch. Div. 591; *Pender v. Lushington*, 6 Ch. Div. 70. With respect to buying stock for the purpose of controlling the corporation, see *Havemeyer v. Havemeyer*, 86 N. Y. 618; *Barnes v. Brown*, 80 N. Y. 527; *Jacobs v. Miller*, 15 Alb. Law J. 188; *Fremont v. Stone*, 42 Barb. 169; *O'Brien v. Breitenbach*, 1 Hilt. 304.

3 *Pennsylvania R. R. Co. v. Commonwealth*, Supr. Ct. Penn. 1887.

4 *Barnes v. Brown*, 80 N. Y. 527. *Contra*, *Fremont v. Stone*, 42 Barb. 169. *Cf.* *Seymour v. Detroit Copper etc. Mills*, 56 Mich. 117.

5 *Regina v. Liverpool etc. R'y Co.* 21 Law J. Q. B. 284; S. C. 16 Jur. 949.

§ 399. **Liability of the corporation for failure or refusal to register.**—The failure of the company to register a proper deed of transfer, whereby the shares have been forfeited and sold, subjects it to liability to an action for damages.¹ And if it refuse to allow registration of a transfer, the party demanding it, whether transferrer or transferee,

may bring an action for damages at law,¹ the measure of damages being substantially the same as in other cases of conversion of stock,² or he may file a bill in equity, and the court will either decree that a registry be made,³ or in case that be not possible, will award damages to the injured party.⁴ It is doubtful, however, whether equity may grant relief by *mandamus*.⁵ While the weight of authority is adverse to resorting to this extraordinary remedy, where no public interest is involved, where no reason is shown for the transfer of a specific favorite thing, and where the remedy by action for damages is fully adequate,⁶ yet there are respectable authorities holding that the writ will issue, especially when there is no good reason for refusal of registration.⁷

1 *Catchpole v. Amburgate etc. Ry Co.* 1 Ill. & B. 111.

2 *Tafford etc. Turnpike Co. v. Gribb*, Supr. Ct. Penn. 1880; *Helm v. Swiggart*, 12 Ind. 124; *Honey v. Manufacturers' etc. Bank* 37 Mass. 414.

3 *Iron R. R. Co. v. Fish*, 41 Ohio St. 321, 33 Am. Rep. 84; *Cleveland R. R. Co. v. Robbins*, 3 Ohio St. 483; *Cook on Stock & Stocks* § 384.

4 *Mechanics' Bank v. Eaton*, 1 Pet. 309; *Cushman v. Thayer Manuf. Co.* 78 N. Y. 308, 30 Am. Rep. 215; *Burris v. Dunsmuir R. R. Co.* 75 N. Y. 331; *Ingot v. Chicago etc. R. R. Co.* 123 Mass. 46; *Iron R. R. Co. v. Fish*, 41 Ohio St. 321, 33 Am. Rep. 84; *Walker v. Detroit Transit Ry Co.* 6 Mich. 321; *C/ Regina v. Liverpool etc. Ry Co.* 21 Law J. Q. B. 364.

5 *Smith v. North American Mining Co.* 1 Nev. 422.

6 *Murray v. Stevens*, 110 Mass. 95.

7 *State v. Miller*, N. Y. Daily Reg. April 18, 1880; *Attey v. Manchester Bank* 10 Johns 484; *Fajardo Fireman's Ins. Co. v. Hill*, 743, *People v. Parker et al.* (Ct. 1) How. Pr. 413; *State v. Romberg*, 46 Mo. 15; *State v. St. Louis etc. Co.* 21 Mo. App. 488; *Townsend v. Nichols*, 73 Me. 15; *Whitman v. Providence Bank*, 3 R. 1, 73; *Birmingham Fire Ins. Co. v. Commercial*, 97 Pa. St. 73; *Baker v. Marshall*, 15 Minn. 177; *Kimball v. Union Water Co.* 64 Cal. 113; *State v. Quorum*, 12 Nev. 148; *King v. Bank of England*, 110 Eng. R. B. 324; *King v. London Assurance Co.* 1 Exch. & B. 319; *Queen v. Liverpool etc. Ry Co.* 21 Law J. Q. B. 364; *Reg. v. Worcester Navigation Co.* 1 Mon. & B. 379.

8 *State v. Chawwa etc. R. R. Co.* 16 N. C. 324; *Townsend v. Melver*, 2 B. C. 2; *Casper v. Swamp etc. Co.* 2 Murph. (S. C.) 106; *State v. First National Bank* 39 Ind. 308; *Green Mountain etc. Co. v. Bullis*, 43 Ind. 1; *People v. Iron Manuf. Co.* 39 Ill. 308; *Lurpie v. Crockett*, 3 Cal. 112; *Regina v. Curative Ry. Co.* Law R. & Q. B. 74; *Norris v. Irish Land Co.* 2 El. & B. 512; *Quadrup v. Glasgow etc. Ry Co.* 13 Up. Can. Can. P. 224; *Brown v. Theobald's Railway* Law 72, citing *Ward v. Northampton Ry Co.* 26 Law J. Q. B. 177, 2 Q. B. 2 El. & B. 512.

§ 400. The rights and remedies of holders of outstanding certificates as against the transferor.—An assignment of the stock certificates, although the transfer be not registered on the corporate books, estops the transferor from asserting any title to the stock as against subsequent *bona-fide* transferees.¹ For example, he cannot, even before registration, attack the assignment on the ground of failure of consideration;² nor on account of informalities in the transfer.³ As a part of the contract of sale, there is an implied guaranty on the part of the vendor that the corporation will permit the stock to be registered in the name of the purchaser, and if it refuses to allow registration, the vendor becomes liable to his vendee thereon.⁴ Accordingly, the refusal of the corporation to register the transfer, does not affect the title to the stock as between transferor and transferee;⁵ nor deprive the transferee of his right to receive dividends upon the stock purchased by him.⁶ So, too, when the corporation has refused registration on the ground that the transferor was indebted to it, and, in order to obtain registration the transferee has satisfied the corporate lien upon the stock by paying the debt, he may recover the amount from his transferor.⁷

1 Cushman v. Thayer, 76 N. Y. 365; 32 Am. Rep. 315; Gilbert v. Manchester etc. Co. 11 Wend. 627; Duke v. Cahawba Navigation Co. 10 Ala. 83; 41 Am. Dec. 472; Baltimore etc. R'y Co. v. Sewall, 35 Md. 238; Hall v. United States Ins. Co. 5 Gill, 484; Bank of America v. McNiel, 10 Bush, 51; Frown v. Smith, 122 Mass. 589; Beckwith v. Burroughs, 13 R. I. 294; People's Bank v. Gridley, 91 Ill. 457.

2 Cushman v. Thayer Manuf. Co. 70 N. Y. 365; 32 Am. Rep. 315; Hall v. United States Ins. Co. 5 Gill, 484.

3 Chew v. Bank of Baltimore, 14 Md. 299; Home Stock Ins. Co. v. Sherwood, 72 Mo. 461; Holyoke Bank v. Goodman etc. Co. 9 Cush. 576; Cheltenham etc. R'y Co. v. Daniel, 2 Q. B. 281; Sheffield etc. R'y Co. v. Woodcock, 7 Mees. & W. 574.

4 *Wilkinson v. Lloyd*, 7 Q. B. 27.

5 *Pool v. Middleton*, 29 Beav. 648; *Crawford v. Provident Ins. Co.* 8 Up. Can. Com. P. 253.

6 *Pool v. Middleton*, 29 Beav. 648.

7 *Bates v. New York Ins. Co.* 3 Johns. Cas. 233.

§ 401. The rights and remedies of holders of outstanding certificates as against the corporation.—If a corporation has allowed a transfer of stock to be registered without requiring the old certificates to be surrendered, a *bona-fide* purchaser of the outstanding certificates has his remedy either against the company,¹ or against the corporate officer who permitted the registration to be made.² But if the company be compelled by legal proceedings, as in case of execution sales, to make registration of the transfer, it is not to be held liable therefor to the owner of the outstanding certificate.³

1 *Baker v. Wasson*, 59 Tex. 140.

2 *Baker v. Wasson*, 59 Tex. 140.

3 *Friedlander v. Slaughter House Co.* 31 La. An. 523; *Cook on Stock & Stockh.* § 339.

§ 402. The rights of a transferee, the certificates outstanding.—The purchaser of stock may insist upon the surrender of the old certificate; but if he do not insist upon its surrender, and the transfer be actually made upon the books of the company, the title to the stock will pass thereby.¹ The non-production of the original certificate of stock is not of itself necessarily fatal to the title of the transferee, and, if he be a *bona-fide* purchaser, his title is good to the new stock issued to him.² Accordingly when a company has once registered a person as a shareholder, it is not entitled to cancel the registration because his legal title afterward

proves to be defective;⁸ but he may compel the company to allow his name to stand upon its registration books,⁴ unless the registration was clearly a clerical error.⁵ But after a stockholder has transferred his shares by assignment of the stock certificates, and his purchaser has caused the transfer to be registered and new certificates issued to him, the original certificates being delivered to the company and canceled, the rights of the original owner of the stock are thereby extinguished, so that no subsequent assignment of the shares by him can pass any title to his second assignee;⁶ and although by mistake a new certificate is issued to the second assignee, he will derive no legal title against the company to be admitted to the rights of a stockholder;⁷ although it would seem that he might have an equitable remedy if he were a *bona-fide* purchaser for value, and had been induced to accept the transfer upon the faith of representations made by the company or its officers.⁸ The registered transferee, without knowledge that his transferrer has already sold the certificates, is not liable to the holder of them.⁹ But where a person purchased stock of a corporation at a sheriff's sale, knowing that the certificates of the same stock had been previously hypothecated, he was held to take subject to the claim of the pledgee.¹⁰

1 *Boatman's Ins. etc. Co. v. Able*, 48 Mo. 136, 140.

2 *Baker v. Wasson*, 53 Tex. 150, 156; citing *New York etc. R. R. Co. v. Schuyler*, 31 N. Y. 30, 80.

3 *Ward v. South Eastern R'y Co.* 29 Law J. Q. B. 177; S. O. 2 HL & E; S. O. 6 Jur. N. S. 890.

4 *Cady v. Potter*, 55 Barb. 463.

5 *Smith v. North American etc. Co.* 1 Nev. 423.

6 *Houston etc. R'y Co. v. Van Alstyne*, 56 Tex. 439.

7 *Houston etc. R'y Co. v. Van Alstyne*, 56 Tex. 439, 447.

8 *Houston etc. Ry Co. v. Van Alstyne*, 55 Tex. 429, 446.

9 *Baker v. Wason*, 53 Tex. 126.

10 *Wright v. Bear Stear etc. Co.* 6 Cal 425; 43 Am. Dec. 117; *Wood's Railway Law*, § 32.

§ 408. The remedy of a transferee, the certificates outstanding.—When the registered owner of shares of stock institutes proceedings to establish his title thereto, he should immediately attach the stock in the domicile of the corporation,¹ or, if he sues in the domicile of the holder of the outstanding certificates, he should obtain an injunction against him restraining their transfer. For otherwise the defendant may at any time before judgment and execution transfer the certificates, and the transferee will be protected;² the rule being that, while the transferee of the defendant will be affected with knowledge of a judgment and execution against his vendor, and any transfer made thereafter will be entirely void,³ he is not affected with knowledge of the pendency of the litigation.⁴ In general, it may be said that the doctrine of *lis pendens* does not apply to sales of stock.⁵ In a case in North Carolina, it was held no defense to an action by the purchaser of shares under attachment and execution, for the purpose of compelling a transfer to him on the corporate books, and the execution of a proper certificate, that they had been duly assigned to a third party before the judgment was rendered under which the sale was made; it not appearing or being alleged that such assignment took place before the levy of the attachment.⁶ No rights, as against the purchaser at the attachment sale, will be acquired by the intended purchaser in a negotiation for the sale of corporate

stock between non-residents, where, prior to the payment of the purchase price or the assignment and delivery of the certificates, an attachment has been levied on it in a suit in equity against the owner, although neither the latter nor the intended purchaser had any actual notice of the attachment bill at the time of the negotiation.⁷

1 *Quari v. Abbott*, 102 Ind. 233; 52 Am. Rep. 662.

2 *Smith v. American Coal Co.* 7 Lans. 317; *Smith v. Crescent City etc.* Co. 30 La. An. 1378.

3 *Sprague v. Cocheeo Manuf. Co.* 10 Blatchf. 173; *Smith v. American Coal Co.* 7 Lans. 317; *Smith v. Crescent City etc.* Co. 30 La. An. 1378.

4 *Holbrook v. New Jersey Zinc Co.* 57 N. Y. 616; *Leitch v. Wells*, 48 N. Y. 586.

5 *Bank of Virginia v. Craig*, 6 Leigh, 399, 435; *Taylor on Corporations*, § 795. *Cf. Dovey's Appeal*, 97 Pa. St. 153, where it was left an open question.

6 *Morehead v. Western N. C. R. R. Co.* 96 N. C. 362.

7 *Young v. South Tredegar Iron Co.* 87 Tenn. 189; 4 Am. St. Rep. 752.

CHAPTER XVII.

STOCKHOLDERS' RIGHTS AND LIABILITIES.

(A.)

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(B.)

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- § 404. How enforced—(a). By action at law.
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(A.)

§ 404. The principal rights and powers of the stockholders enumerated.—The management and transaction of all business for which the company was created, and the general affairs of the corporation, devolve upon the directors, and clearly may be exercised by them; but there are other powers that are as clearly reserved to the shareholders.¹ The powers of directors are such as are conferred by the charter of their corporation and the laws pertaining thereto, and such corporate powers as are not conferred by law upon the directors remain in the corporation to be exercised, or at least set in motion, by its component parts, the shareholders.² To the shareholders is reserved the right to effect any great or radical change in the organization of the company,³ to accept or reject legislative amendments of the corporate charter,⁴ to change the termini of the railway,⁵ to increase or diminish the capital stock,⁶ to mortgage the corporate property,⁷ and to determine the amount of money which shall be borrowed on mortgage,⁸ to lease the road or to alter the terms of an existing lease,⁹ to sell and transfer the charter and franchises,¹⁰ and to dissolve the corporation.¹¹ The shareholders are vested with authority to make by laws for the government of the corporation,¹² to elect¹³ and to remove directors and officers for the general management of the corporate enterprise,¹⁴ to increase or diminish the number of directors,¹⁵ and, in En-

gland, to declare dividends.¹⁶ As incidental to their other rights and powers the shareholders may inspect the corporate books,¹⁷ may institute legal proceedings against directors and officers guilty of fraudulent and illegal or *ultra vires* acts,¹⁸ and under certain circumstances they may maintain actions in behalf of the corporation.¹⁹

1 *Eidman v. Bowman*, 58 Ill. 444; 11 Am. Rep. 90.

2 *Metropolitan Elevated R'y Co. v. Manhattan R'y Co.* 11 Daly, 377; S. C. 15 Am. & Eng. R'y Cas. 1, per VAN BRUNT, J.

3 *Eidman v. Bowman*, 58 Ill. 444; 11 Am. Rep. 90.

4 *Railway Co. v. Allerton*, 18 Wall. 233, 235. *Vide supra*, §§ 40-49. But an enabling act merely extending the privileges of the company may be accepted by the directors: *Eastern R. R. Co. v. Boston etc. R. R. Co.* 111 Mass. 125; 15 Am. Rep. 13; *Joy v. Jackson etc. Plank Road Co.* 11 Mich. 155, 170. *Cf. Illinois River R. R. Co. v. Zimmer*, 20 Ill. 654.

5 In New York the assent of two-thirds of the stockholders is requisite: N. Y. Laws of 1871, ch. 560, § 2.

6 *Railway Co. v. Allerton*, 18 Wall. 233; *Eidman v. Bowman*, 58 Ill. 444; 11 Am. Rep. 90; 8 Vict. ch. 16, § 91.

7 Mass. Pub. Stat. ch. 106, § 23; *Saltmarsh v. Spaulding*, 147 Mass. 224; 4 R'y & Corp. Law J. 151.

8 8 Vict. ch. 16, § 91.

9 *Stevens v. Davison*, 18 Gratt. 819; 98 Am. Dec. 692; *Penobscot etc. R. R. Co. v. Dunn*, 39 Me. 587, 601; *Bedford R. R. Co. v. Bowser*, 48 Pa. St. 29, 37; *Kersey Oil Co. v. Oil Creek etc. R. R. Co.* 12 Phila. 374.

10 *Eidman v. Bowman*, 58 Ill. 444; 11 Am. Rep. 90.

11 *Smith v. Smith*, 3 Desaus. Ch. 547; *Eidman v. Bowman*, 58 Ill. 444; 11 Am. Rep. 90; *Angell & Ames on Corporations*, § 772.

12 *Vide infra*, § 405.

13 *Vide infra*, CHAPTER XIX; *Eidman v. Bowman*, 58 Ill. 444; 11 Am. Rep. 90; 8 Vict. ch. 16, § 19.

14 *Vide infra*, CHAPTER XIX; *Isle of Wight R'y Co. v. Tahourdin*, 25 Ch. Div. 320.

15 8 Vict. ch. 16, § 91.

16 8 Vict. ch. 16, § 91.

17 *Vide infra*, § 406.

18 *Vide infra*, § 411-414.

19 *Vide infra*, § 415-418.

§ 405. The power to make by-laws.—The power to make by-laws for the government of the corporate affairs is vested in the shareholders in meeting assembled.¹ This power is frequently ex-

pressly conferred upon them by the act of incorporation, or by general statute, as in New York;² but it exists also independently of express legislative grant as incidental to their corporate existence.³ The power must be exercised in conformity to the law of the land, that being the rule to regulate the proceedings of artificial bodies as well as the conduct of natural persons.⁴ So strictly has this salutary principle of subjection been enforced in England, that even a by-law in pursuance of an express power in a charter granted by the king, if contrary to the common law or act of Parliament, is void.⁵

1 *People v. Kipp*, 4 Cowen, 382, note; *Kearny v. Andrews*, 10 N. J. Eq. 20; *Commonwealth v. Woelper*, 3 Serg. & R. 29; 8 Am. Dec. 628; *Juker v. Commonwealth*, 20 Penn. St. 484; *People v. Crossley*, 69 Ill. 195; *Carroll v. Mullanphy Savings Bank*, 8 Mo. App. 249, 253; *Newling v. Francis*, 3 Tenn. Rep. 484. Cf. *Samuel v. Holladay*, 1 Woolw. 400; *Heintzelman v. Druids' Relief Assoc.* (1888) 38 Minn. 138.

2 N. Y. Laws of 1885 ch. 489, § 4.

3 *In re Long Island R. R. Co.* 19 Wend. 37, 41; 32 Am. Dec. 429.

4 *In re Long Island R. R. Co.* 19 Wend. 37; 32 Am. Dec. 429; *People v. Phillips*, 1 Denio, 388; *Taylor v. Griswold*, 14 N. J. 222; 27 Am. Dec. 33; *Commonwealth v. Gill*, 3 Wharton, 228; *Brewster v. Hartley*, 37 Cal. 15, 24; 99 Am. Dec. 237; *Rex v. Head*, 4 Burr. 2515. Cf. *Watkins v. Wilcox*, 66 N. Y. 654; S. C. 4 Hun. 220; *Rex v. Spencer*, 3 Burr. 1827; *Graw v. Prussia Emigrated etc. Society*, 36 N. Y. 160; *Petty v. Tooker*, 21 N. Y. 267, affirming S. C. *sub. nom.* *Parish of Bellport v. Tooker*, 29 Barb. 256; *Burrel v. Associate Reformed Church*, 44 Barb. 2823.

5 Angell & Ames on Corporations, 196; Wilcox on Corporations, 95; Kyd on Corporations, 109. Cf. *Clark's Case*, 5 Coke, 64.

§ 406. Of the right to inspect the corporate books.—The shareholders of a corporation have a right at common law to examine and inspect the books and records of the corporation, at all seasonable times, and to be thereby informed of the condition of the corporation and its property.¹ In many of the American States this right of the stockholder is guarantied by statute.² In New York it is held that the statute is not exclusive of

the common-law right.³ The stockholders are entitled to this inspection, although their only object may be to ascertain whether their affairs have been properly conducted by the directors or managers;⁴ and although they may be hostile to the corporation.⁵ It is immaterial that the exercise of the right may be inconvenient to the bookkeepers and managers;⁶ for the doctrine of the law is that the books and papers of the corporation, though of necessity kept in some one hand, are the property of all the stockholders alike.⁷ The stockholder is not restricted to a personal examination of the books, but may exercise his right through the medium of an agent.⁸

1 *People v. Lake Shore etc. R. R. Co.* 11 Hun, 1; S. C. affirmed *sub nom.* *In re Sage*, 70 N. Y. 220; *Lewis v. Brainerd*, 53 Vt. 519; *Commonwealth v. Phoenix etc. Co.* 105 Pa. St. 111; 51 Am. Rep. 184.

2 N. Y. Rev. Stat. 601, § 1; Mo. Rev. Stat. §§ 720, 721; Mass. Laws of 1860, ch. 68, § 10; R. I. Pub. Stat. ch. 153, § 21, and ch. 158, § 24; Vt. Laws, §§ 3294, 3595; Ill. Rev. Stat. ch. 32, § 13; al. Civ. Code, §§ 377, 378; Cal. Penal Code, § 553; Colo. Gen. Stat. § 245; Ohio Rev. Stat. § 3312.

3 *People v. Lake Shore etc. R. R. Co.* 11 Hun, 1; S. C. affirmed *sub nom.* *In re Sage*, 70 N. Y. 220. per DAVIS, P. J.

4 *Huyler v. Cragin etc. Co.* 40 N. J. Eq. 392.

5 *People v. Throop*, 12 Wend. 183; *People v. Mott*, 1 How. Pr. 247.

6 *Commonwealth v. Phoenix etc. Co.* 105 Pa. St. 111; 51 Am. Rep. 184.

7 *Commonwealth v. Phoenix etc. Co.* 105 Pa. St. 111; 51 Am. Rep. 184; *Huyler v. Cragin etc. Co.* 40 N. J. Eq. 392.

8 *State v. Blenville Oil Works*, 28 La. An. 204.

§ 407. Whether the right to inspect includes the right to make copies.—Speaking generally, a right to take copies is incidental to a right to inspect,¹ unless the act of incorporation granting the right to inspect expressly excludes the right to take copies,² or unless the inspection is all that can be reasonably required for any legitimate purpose.³ For a person may have a right to inspect the

whole of a book or document, in order to find out what concerns him, and in that case his right to inspect may extend to much more than he has a right to copy.⁴

1 *Mutter v. Eastern etc. Ry Co.* (Eng. Ct. of App. 1888) 4 Ry & Corp. Law J 402, 405; S. C. 39 Law T Rep. N. S. 117; *Rex v. Freeman* (Lutma, 1 Strange, 1223, and note in which many cases are collected); *Browning v. Aspin*, 7 Barn. & C. 204; *Rex v. Lucas*, 10 East, 230; *Reit. Merchant Tailors' Co* 1 Barn. & Adol. 115; *In re Burton*, 31 Law J Q. B. 88. The statutory right of inspection of register of debenture stock under sec. 26 of the Companies Clauses Act of 1863 includes right to take copies. A person who has taken shares at 1 share of rival company has still right to inspect and take copies. *Forrest v. M. S. and L. Co* 4 Law T Rep. N. S. 686; 4 L. G. & J. 135; distinguished note upon 26 & 27 Vin. ch. 118, § 20, *Lindsay*, 2d ed., book 15, ch. 10, § 3 p. 967, 4th ed. p. 982; *Fallick on Contracts*, 1st ed. 108; 2d ed. 686; *Brown & Theobald on Railways*, 1st ed. 462; 2d ed. 467; 1 *Chitty's Archbold* (14th ed.), 611.

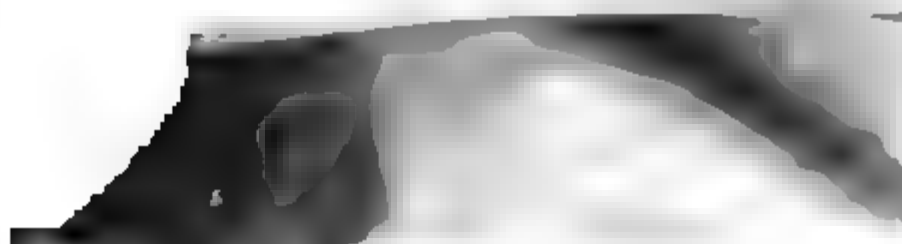
2 *Mutter v. Eastern etc. Ry Co.* (Eng. Ct. of App. 1888) 4 Ry & Corp. Law J 402, 405; S. C. 39 Law T Rep. N. S. 117.

3 *Mutter v. Eastern etc. Ry Co.* (Eng. Ct. of App. 1888) 4 Ry & Corp. Law J 402, 405; S. C. 39 Law T Rep. N. S. 117.

4 *Mutter v. Eastern etc. Ry Co.* (Eng. Ct. of App. 1888) 4 Ry & Corp. Law J 402, 405; S. C. 39 Law T. Rep. N. S. 117; *Rex v. Merchant Tailors' Co* 1 Barn. & Adol. 115. Cf. *Rex v. Justices of Staffordshire*, 6 Ad. & E. 64, 70, 101.

§ 408. To what books the right of inspection extends.—Although the right to inspect the corporate books containing the "stock subscriptions and accounts" be found in a statute under the heading "Capital Stock," the inspection is not thereby limited to the books containing the stock accounts, but extends to those containing the general accounts.¹ The right of the stockholders to inspect the corporate books does not extend ordinarily to the minutes of the directors' meetings, unless that right has been expressly given by charter;² although upon especial occasions and for especial purposes, an inspection of the books containing the proceedings of the directors may be highly proper.³

¹*Re v. Bernenthal* (Wis. 1889), 4 Ry & Corp. Law J 426, construing Stat. (1878) § 1757.



2 *Alabama etc. R. R. Co. v. Howley* 9 Fla. 555; *Queen v. Mariquita Mining Co.* 1 Kl. & R. 299; *Lindley on Partnership* (4th ed.), 292.

3 *Queen v. Mariquita Mining Co.* 1 Kl. & R. 299.

§ 409. How right of inspection may be enforced—*Mandamus*.—While a stockholder may maintain an action for damages against the officials of the company who refuse him access to the books,¹ yet this may often be a very inadequate remedy, both by reason of the time necessary to prosecute his action and also because the deprivation of his right cannot in many cases be accurately estimated in damages; accordingly, if he do not choose to resort to an action for damages, he may, in a proper case, compel the corporate officers to allow him to exercise his rights by means of a writ of *mandamus*.² In the case of actions already pending between a stockholder and the corporation, an inspection of the corporate books may be obtained by an order of court.³ In an action pending between a stockholder and some person a stranger to the corporation, the former may procure an inspection of the corporate books by an order of court; but it is doubtful whether this privilege would be accorded the latter.⁴

1 *Lewis v. Brainerd*, 13 Va. 317; *Commonwealth v. Phoenix etc. Co.* 105 Pa. 24, 111, 51 Am. Rep. 124.

2 *Cookburn v. Union Bank*, 13 La. An. 289; *Commonwealth v. Phoenix etc. Co.* 105 Pa. 24, 111, 51 Am. Rep. 124. Cf. *King v. Clear*, 4 Harv. 6 C 289.

3 N. Y. Code of Civil Proc. §§ 803, 809; *Boorman v. Atlantic etc. R. R. Co.* 78 N. Y. 289; *Thompson v. Erie R'y Co.* 9 Abb. Pr. N. S. 230; *Walker v. Granite Bank*, 19 Abb. Pr. 111; *Ervin v. Oregon R'y Co.* 29 Hun, 586; *Swanson v. R'y Co. v. Budd*, Law R. 2 Eq. 374; *King v. Travancor*, 3 Chit. 294; *Re v. Newcastle* 1 Strange 1221. Cf. *Hall v. Connell*, 3 Youngs & C. 707; *Wallace v. Ingilby* 1 Mylne & K. 51. But see *Birmingham etc. R'y Co. v. White*, 1 Q. B. 722, where it was held that an inspection of the books would not be ordered where the defendant, a stockholder, merely wished to ransack them for the discovery of a possible defect in S. F. Credit Co. v. Webster, 23 Law T. 419. As to the right of stockholders to obtain a subpoena duces tecum for the production of the corporate books, see N. Y. Code of Civil Proc. §§ 803, 809; *La Farge v. La Farge Fire Ins. Co.* 15 How. Pr. 26.

4 *Opdyke v. Marble*, 44 Barb. 64; *Morgan v. Morgan*, 18 Abb. Pr. N. 2
201, *Mayor of Southampton v. Graves*, 8 Term R. 400.

§ 410. *When mandamus will lie.*—The issue of the writ of *mandamus* is in the sound discretion of the court; for to hold that every person who shows himself to be a holder of stock is at liberty to demand an examination of the books and as often as he may please, and, if refused, to apply for a writ of *mandamus* to enforce an absolute right, would be to establish a rule highly prejudicial to the interests of all corporations and their stockholders.¹ The power of the court should be exercised in such cases with great discrimination and care,² with due reference to precedent.³ The writ should not be granted to enable a director to make entries in the books,⁴ nor to enable a shareholder to accomplish personal or speculative ends,⁵ nor to enable him to gratify idle curiosity or vague suspicion.⁶ The stockholder must state with precision and definiteness, some well-defined purpose, some reasonable cause for desiring access to the books, and must show that he has some interest in the matter.⁷ Having done this, the writ will issue in his favor; although the applicant be hostile to the company.⁸ Although a shareholder may have purchased stock as a puppet and agent of a rival company, he may maintain an action to enforce his right as a stockholder, to inspect the corporate books, and the court will not inquire whether he be a trustee for others.⁹ *Mandamus* will lie, although the stockholder seeking access to the books had no suit pending against the company, and entertained no purpose of instituting an action

gainst it;¹⁰ and to enable a stockholder to procure information in a controversy, to which the corporation is not a party.¹¹

1 *In re Sage*, 70 N. Y. 220, affirming S. C. *sub nom. People v. Lake Shore etc. R. R. Co.* 11 Hun. 1; *People v. Northern Pacific R'y Co.* 50 N. Y. Super. Ct. 456; S. C. 13 Fed. Rep. 471.

2 *In re Sage*, 70 N. Y. 220, affirming S. C. *sub nom. People v. Lake Shore etc. R. R. Co.* 11 Hun. 1; *Regina v. Wiltshire etc. Co.* 29 Law T. 922.

3 *Regina v. Wiltshire etc. Co.* 29 Law T. 922.

4 *Rosenfield v. Einstein*, 46 N. J. 479.

5 *In re Sage*, 70 N. Y. 220, affirming S. C. *sub nom. People v. Lake Shore etc. R. R. Co.* 11 Hun. 1; *In re West Devon etc. Mine*, 27 Ch. Div. 106.

6 *Commonwealth v. Phoenix etc. Co.* 105 Pa. St. 111; 51 Am. Dec. 18; *People v. Walker*, 9 Mich. 328; *Rosenfield v. Einstein*, 46 N. J. 479.

7 *State v. Bienville Oil Works*, 28 La. An. 204; *Hatch v. City Bank*, 1 Rob. (La.) 470.

8 *People v. Throop*, 12 Wend. 181.

9 *Mutter v. Eastern etc. R'y Co.* (Eng. Ct. of App. 1888) 4 R'y & Corp. Law J. 492, 404; S. C. 59 Law T. Rep. N. S. 117, distinguishing *Forrest v. Manchester etc. R'y Co.* 4 Law T. Rep. N. S. 666.

10 *Cockburn v. Union Bank*, 13 La. An. 289; *Huyler v. Craigin etc. Co.* 40 N. J. Eq. 392. But see *King v. Merchant Tailors' Co.* 2 Barn. & Adol. 115.

11 *Rex v. Newcastle*, 2 Strange, 1223; *Mayor of Southampton v. Graves*, 8 Term R. 590. For further examples of the issue of the writ, see *Coe-thal v. Brower*, 5 N. Y. 562; *Regina v. Wiltshire etc. Co.* 29 Law T. 922.

§ 411. The right to sue to remedy ultra vires acts.—A shareholder may maintain a bill in equity to impeach (1) those acts which are invalid because they are beyond the powers of the corporation, acting either through its directors, officers and agents, or by a majority of its stockholders;¹ or (2), such acts as, although within the corporate powers, are yet invalid because a majority of the shareholders alone have the right to perform them, and have refused to sanction the usurpation of that right by the directors.² In all such cases he may sue either in a representative action or as sole plaintiff.³ And the fact that a majority of the shareholders at a meeting of the company disap-

§ 412. The right to maintain actions to remedy the frauds of directors, officers and agents.—A shareholder of a corporation may maintain an action, on behalf of the corporation, against the directors and others for frauds, wrongs, and breaches of trust, and for the recovery from them of money which they have fraudulently deprived the company of, and for this purpose it is competent for the corporation to be joined as party defendant.¹ The acts constituting negligence need not be set forth in detail, since such actions are in the nature of an accounting.² The damages recovered in an action instituted by shareholders in behalf of the corporation against directors, officers or agents, belong not to the stockholders but to the corporation.³ For an injury done to the capital or property of the corporation is not an injury to each separate stockholder but to the whole body of stockholders in common.⁴ But a stockholder cannot hold the corporation itself liable for the negligence of its directors.⁵ After the undertaking has been under statutory powers handed over to another company in consideration of moneys which are in the control of the directors of the old company, a shareholder may maintain an action for account against the directors.⁶ Similarly, when an act directed that a company should transfer its property to another company and be dissolved, and that the money to be paid by the purchasing company should be applied in a particular way among creditors and preferential shareholders, it was held that a properly framed bill by a creditor and preferential shareholder might be sustained.⁷

1. *Beach v. Cooper*, 73 Cal. 22.

2. *Ackerman*, 36 N. J. Eq. 361, affirming 21 N. J. Eq. 229. See

also *Smith v. Poor*, 3 Ware, 145; 63 Am. Dec. 672; *Gardner v. Pollard*, 10 How. 674; 2 N. Y. Rev. Stat. 888, § 1, and 691, § 14; *Cook on Stock & Stockh.* § 678.

3 *Dewing v. Perdicaris*, 86 U. S. 103, 128; *Evans v. Brandon*, 53 Tex. 56; *Smith v. Poor*, 40 Me. 415; 63 Am. Dec. 672; *Carter v. Ford et al.* Co. 85 Ind. 180.

4 *Smith v. Hurd*, 53 Mass. 371; 46 Am. Dec. 690.

5 *Oliphant v. Woodburn et al.* Co. 63 Iowa, 332; *Cook on Stock & Stockh.* 679.

6 *Cramer v. Bird*, 6 Eq. 143; *Brown & Theobald's Railway Law*, 104.

7 *Ward v. Sittingbourne et al.* R'y Co. 9 Ch. 438; *Brown & Theobald's Railway Law*, 104.

§ 418. Of representative actions brought by a single shareholder.—When an action is brought in respect of an act *ultra vires*, which may affect the rights of any particular class of shareholders, that class is sufficiently represented by one of its members.¹ Accordingly, a shareholder is entitled to sue on behalf of himself and all others similarly interested, although no members of the class besides himself may be willing to sue.² In the case of representative actions, the class which the plaintiff represents must be a class of persons having the same interest, and must not be composed of persons who have adverse claims.³ But though there may be members of the class willing and entitled to sue, the suit cannot be maintained if the plaintiff is personally precluded from suing.⁴ Where the illegal act is the act of the whole company or its executive, different classes of shareholders need not be independently represented.⁵

1 *Hoole v. Great Western R'y Co.* 3 Ch. 262. See *Cramer v. Bird*, 6 Eq. 143.

2 *Brown & Theobald's Railway Law*, 104, and cases there cited.

3 *Ward v. Sittingbourne et al.* R'y Co. 9 Ch. 28.

4 *Burt v. British et al. Association*, 4 De Gex & J. 153.

5 *Hoole v. Great Western R'y Co.* 3 Ch. 262; *Brown & Theobald's Railway Law*, 106.

§ 414. Of laches as a bar to the shareholder's remedy.—The stockholder's right to impeach the *ultra vires*, illegal, or fraudulent acts of the corporation, or its directors, officers and agents, may be barred by delaying to institute proceedings promptly after notice thereof.¹ His consent may be inferred from acquiescence after full knowledge of the transaction.² The shareholder has no right to lie idly by until new equities arise, and speculate on the success or non-success of the investment or transaction of which he complains, and see others, in good faith and without fraud, by a vast expenditure of money, make that valuable which was before valueless, and then come and ask the aid of the chancellor to enable him to appropriate to himself such benefits and advantages.³ But mere silence on the part of some of the stockholders, while the transactions are sought to be impeached by others, does not imply acquiescence therein by the former.⁴ The weight which is due to lapse of time, in a great measure depends upon the extent of the interests involved, and the circumstances of each particular case.⁵ So short a delay as eight months has been held, under certain circumstances, to bar the shareholder's remedy.⁶ In another case eighteen months was deemed an unreasonable delay.⁷ In a recent case in Massachusetts it was held that a stockholder cannot bring suit for improper investments of corporate funds made three years before, if he knew of them at the time and did not object.⁸ In other cases his remedy has been lost by a delay of two,⁹ three and a half,¹⁰ four,¹¹ six,¹² seven,¹³ twelve,¹⁴ and twenty years.¹⁵ But a delay of fifty-four days, together with a failure to vote against the act com-

plained of, has been held no bar to the shareholder's action.¹⁶

1 *Metropolitan Elevated R'y Co. v. Manhattan Elevated R'y Co.* 11 Daly, 373; S. C. 14 Abb. N. Cas. 103; *Zabriskie v. Hackensack etc. R. R. Co.* 18 N. J. Eq. 178; *Ashhurst's Appeal*, 60 Pa. St. 290; *McLoughlin v. Detroit etc. R'y Co.* 8 Mich. 100; *Speckman v. Evans*, Law R. 3 H. L. 171; *Downes v. Ship*, Law R. 3 H. L. 343; *Gray v. Chaplin*, 2 Russ. 136. Cf. *Harwood v. Railroad Co.* 17 Wall. 78; *Badger v. Badger*, 2 Wall. 87; *Boardman v. Lake Shore etc. R'y Co.* 81 N. Y. 157; *Rochdale Canal Co. v. King*, 2 Sim. N. S. 83; *Zabriskie v. Cleveland etc. R. R. Co.* 23 How. 381; *Hervay v. Illinois etc. R'y Co.* 28 Fed. Rep. 169; *Thompson v. Lambert*, 44 Iowa, 239; *Vigers v. Pike*, 8 Clark & F. 582, 650.

2 *Evans v. Smalcombe*, Law R. 3 H. L. 242, affirming Law R. 3 Eq. 769.

3 *Kitchen v. St. Louis etc. R'y Co.* 69 Mo. 224.

4 *Metropolitan Elevated R'y Co. v. Manhattan Elevated R'y Co.* 11 Daly, 373; S. C. 14 Abb. N. Cas. 103.

5 *Great Western R'y Co. v. Oxford etc. R'y Co.* 3 De Gex, M. & G. 341; *Houldsworth v. Evans*, Law R. 3 H. L. 263.

6 *Great Western R'y Co. v. Oxford etc. R'y Co.* 3 De Gex, M. & G. 341. See also *Boston etc. R. R. v. New York etc. R. R. Co.* 13 R. I. 260; *Aurora etc. Soc. v. Paddock*, 80 Ill. 263; *Stewart v. Erie etc. Transportation Co.* 17 Minn. 372.

7 *Graham v. Birkenhead etc. Co.* 2 Macn. & G. 148.

8 *Dunphy v. Travelers' Newspaper Assoc.* (1885) 145 Mass. 495.

9 *Graham v. Boston etc. R. R. Co.* 118 U. S. 191; *Pneumatic Gas Co. v. Berry*, 113 U. S. 322; *Kitchen v. St. Louis etc. R'y Co.* 69 Mo. 124; *International etc. R. R. Co. v. Bremond*, 63 Tex. 66; *Royal Bank v. Grand Junction R. R. Co.* 125 Mass. 490; *In re Pinto etc. Co.* 8 Ch. Div. 273; *In re Magdalena etc. Co.* 5 Jur. N. S. 975.

10 *Peabody v. Flint*, 88 Mass. 54.

11 *Shelden etc. v. Eickemeyer etc. Co.* 90 N. Y. 607.

12 *Gregory v. Patchett*, 83 Beav. 605.

13 *Boston etc. R. R. Co. v. New York etc. R. R. Co.* 13 R. I. 260; *Ashhurst's Appeal*, 60 Pa. St. 290.

14 *Brotherhood's Case*, 31 Beav. 365.

15 *Gifford v. New Jersey R. R.* 10 Co. N. J. Eq. 171.

16 *Mills v. Central R. R. Co.* 41 N. J. Eq. 6.

§ 415. Whether the shareholders may institute and defend actions for and against the corporation.—Ordinarily the shareholders cannot institute nor defend actions for or against the corporation, in the absence of fraud or collusion on the part of the corporate management with the adverse party,¹ nor object to a compromise of an action

against the company agreed to by the directors,¹ nor appeal from a judgment rendered against it.² There may be claims against directors, against officers, against debtors; there may be a variety of things which a company may be well entitled to complain of, but which as a matter of good sense it does not think right to make the subject of litigation; and it is the company as a company which has to determine whether it will make anything that is a wrong to the company, a subject-matter of litigation, or whether it will take steps itself to prevent the wrong from being done.³ Even where all the stock is owned by one person, the property of a corporation does not belong to him individually; and it can be sued for and recovered only in the name of the company.⁴ It would seem that where a single shareholder brings an action in the name of the company, the court may direct a meeting of the company, and if a majority disapprove of the action, the name of the company will be stricken out as plaintiff.⁵ Leave, however, may be given to amend and to add the company as defendant.⁶ Actions against directors to compel them to the performance of their duties must be instituted ordinarily in the name of the company.⁷

1 *Graham v. Boston etc. R. R. Co.* 118 U. S. 161, affirming S. C. 14 Fed. Rep. 753; *Oglesby v. Attrill*, 105 U. S. 635; *Forbes v. Whitlock*, 3 Edw. Ch. 443; *Farnum v. Ballard etc. Shop*, 12 Cush. 577; *Lane v. Weymouth School District*, 10 Met. 462; *Caine v. Brigham*, 39 Me. 35; *Dale v. Grant*, 34 Law J. 142.

2 *Donohue v. Mariposa etc. Co.* 66 Cal. 317; *Shawhan v. Zinn*, 79 Ky. 303.

3 *Silk Manufacturing Co. v. Campbell*, 27 N. J. 539.

4 *MacDougall v. Gardiner*, 1 Ch. Div. 13.

5 *Button v. Hoffman*, 61 Wis. 20; S. C. 50 Am. Rep. 131.

6 *MacDougall v. Gardiner*, 1 Ch. 13; *Exeter etc. Ry Co. v. Buller*, 5 Rob. C. 211; *East Pant Du Lead Mining Co. v. Merryweather*, 13 Week. R. 216; 2 Hem. & M. 254. See, too, *Cape Breton v. Fenn*, 17 Ch. Div. 136.

7 *Silber Light Co. v. Silber*, 12 Ch. Div. 717; *Browne & Theobald's Railway Law*, 104.

8 *Hersey v. Veazie*, 24 Me. 9; 41 Am. Dec. 364; *Smith v. Hurd*, 12 Met. 371; 46 Am. Dec. 630; *Taylor on Corporations* (2d ed. 1889), § 615.

§ 416. The same subject, continued.—When that right arises.—When, however, the refusal of the corporate management to institute or defend legal proceedings with respect to the corporate interests, partakes more of a disregard of duty than of an error of judgment, where it is a non-performance of a manifest official obligation, amounting to what the law considers a breach of trust, although it may not involve an intentional moral delinquency, the stockholders have the right to interfere,¹ as for example, to defend the company against an illegal tax;² to enforce the payment of subscriptions to the capital stock;³ to remove a cloud from the title of the company's property.⁴

1 *Dodge v. Woolsey*, 18 How. 331; *Sheridan v. Sheridan Electric Light Co.* 38 Hun, 396.

2 *Dodge v. Woolsey*, 18 How. 331.

3 *Wallworth v. Holt*, 4 Mylne & C. 615.

4 *Baldwin v. Canfield*, 26 Minn. 43, 54.

§ 417. Refusal of directors to act, a prerequisite to the shareholder's right herein.—Ordinarily, a stockholder seeking to sue or defend for the company, must, in order to act in his own name, show that he has endeavored in vain to secure action on the part of the directors.¹ This rule applies even where all the capital stock is held by the complaining shareholder.² But it does not apply to a case where the wrong-doers are the managers and majority of the stockholders of the corporation. An application by a stockholder to them, would be an

application to bring suit against themselves in the name of the corporation; and so absurd a requirement cannot be imposed upon a stockholder, as a condition for affording relief for a clear wrong.¹ Accordingly, when the managers and majority of the stockholders of a corporation divert its assets and property from their legitimate purposes, to the use and benefit of one of such majority, a minority of stockholders may bring suit without applying to have suit brought in the name of the corporation.⁴ Thus, a suit to enjoin a corporation from entering into an unlawful consolidation, under the sanction of the directors and a majority of the shareholders, but without any notice to, and to the injury of the minority, may be maintained by a dissenting shareholder, and it is not necessary for him to allege that he has fruitlessly appealed to the governing body, or to the shareholders, to prevent such illegal action.⁵ So also it has been held, that suit for the rescission of an illegal contract may be brought by a stockholder of an insolvent corporation, without a previous demand upon the corporation to sue, if the corporation appears unable to act by reason of its directors being under the control of the persons with whom the contract was made.⁶ In a recent case it was held, that a stockholder, complaining of misconduct of the treasurer of a corporation, is not excused from applying to the directors to bring suit, before bringing it himself, by the fact that the treasurer owns the majority of the stock, though that fact does excuse him from applying to a stockholders' meeting.⁷

1 *Taylor v. Holmes*, 127 U. S. 499, 492; *Rothwell v. Robinson* (Minn. 1888), 4 R'y & Corp. Law J. 213; *City of Chicago v. Cameron*, 120 Ill. 447. See also *Fisher v. Andrews*, 37 Hun. 176, where it was held, that a member

of an association may bring an action, which should properly be instituted by the receiver, only when he shows a request by him to the receiver to bring the action. Where through fraudulent conspiracy the directors have refused to sue, they should be made parties defendant to the action brought by the stockholder *Slattery v. St. Louis etc. Transportation Co.* 11 Mo. 217; 62 Am. Rep. 215.

2 *Park v. Uister etc. Co.* 26 W. Va. 103.

3 *Rothwell v. Robinson* (Minn. 1883), 4 R'y & Corp. Law J. 213. *Acc. Kelsey v. Sargent*, 40 Hun. 150. *Cf. Fogle v. West Point etc. Assoc.* 30 Fed. Rep. 513.

4 *Rothwell v. Robinson* (Minn. 1883), 4 R'y & Corp. Law J. 213.

5 *Nathan v. Tompkins*, 82 Ala. 437.

6 *Currier v. New York etc. R. R. Co.* 35 Hun. 355.

7 *Dunphy v. Travelers' Newspaper Assoc.* (1888) 145 Mass. 495.

§ 418. What interest in stock will entitle its holder to sue herein.—In a bill filed by stockholders to correct a mistake in a deed to the corporation, an averment that complainants are owners of a majority of the stock, but without any statement as to how or where they became so, or whether they were stockholders at the time the matter complained of occurred, or became stockholders afterwards, is not a sufficient averment of their relation to the corporation, or of their interest in the subject of the suit, to enable them to bring it in their own names, where it appears that, although the corporation had expired by limitation, it still exists for the purpose of winding-up, and that, although most of the directors are dead, one of them survives, and that no application has been made to him to bring the suit, nor any effort to call together the stockholders, or to obtain any united action in the assertion of this claim.¹ The original allottee or the purchaser of scrip issued to raise funds for a particular purpose, whether he has been registered or not, may maintain an action on behalf of himself and other scripolders to restrain the company from applying the funds to other purposes, and the ven-

dor of the scrip need not be a party.³ It has been held that the holder of a scrip certificate cannot maintain an action on behalf of himself and all other shareholders after he has assigned the shares mentioned in the scrip.³ It would seem that a shareholder who is a mere trustee cannot maintain a representative action.⁴ It is no objection to an action by a shareholder that he has become a shareholder for the purpose of bringing the action:⁵ although a person who is indemnified by other parties, and is not in good faith acting in his own interest as shareholder, will not be allowed to maintain an action.⁶

1 Taylor v. Holmes, 127 U. S. 489.

2 *Bagshaw v. Eastern Union R'y Co.* 7 Hare, 114; S. C. 2 Macn. & G. 389.

3 Doyle v. Muntz, 5 Hare, 509.

4 *Bagshaw v. Eastern Union R'y Co.* 7 Hare, 114; S. C. 2 Macn. & G. 389. The doubt expressed in the head-note to *Mills v. Northern R'y of Buenos Ayres Co.* 5 Ch. 620, as to whether persons having an equitable interest in shares, but not being registered shareholders, can maintain an action to restrain an act *ultra vires*, does not appear to be supported either by the judgment or by principle. (See *Great Western R'y Co. v. Rushout*, 5 De Gex & S. 290). The trustees should, of course, be made parties to such an action: *Browne & Theobald's Railway Law*, 105.

5 *Seaton v. Grant*, 2 Ch. 459; *Bloxam v. Metropolitan R'y Co.* 3 Ch. 35.

6 *Forrest v. Manchester etc. R'y Co.* 7 Jur. N. S. 887; 4 De Gex, F. & T. 126; *Tilber v. L. B. & S. O. R'y Co.* 1 Hurl. & M. 489; *Browne & Theobald's Railway Law*, 105.

(B.)

§ 419. Of the shareholder's liability to corporate creditors.—Probably the most important practical difference between an incorporated company and an ordinary association or partnership, is the exemption of the private property of the members of a corporation from the claims of creditors, beyond the amount which they have staked upon the success of the enterprise. Upon the share-

holders of banking and manufacturing companies an additional liability equal to the amount of stock held by them is sometimes imposed by statute or by charter.¹ But the general rule, in the absence of statutory or charter provisions imposing a greater liability, is that the shareholders of a corporation are liable to corporate creditors only to the amount remaining unpaid upon the shares to which they have subscribed. In Alabama, West Virginia, Missouri, Nebraska and Oregon, there are constitutional guaranties that stockholders shall in no case be liable otherwise than for unpaid stock owned by them.² In New York it is enacted by the General Railroad Act of 1850, that each shareholder of any company formed thereunder shall be individually liable to the creditors of the company, to an amount equal to the amount unpaid on the stock held by him, for all the debts and liabilities of the company, until the whole amount of the capital stock held by him shall have been paid to the company.³

1 *Cf. Root v. Slincock*, 130 Ill. 350; 60 Am. Rep. 538.

2 Stinson's Am. Stat. Law (1885), § 449.

3 N. Y. Laws of 1850, ch. 140, § 10, as amended by N. Y. Laws of 1854, ch. 282.

§ 420. **The extent of the liability.**—If the whole amount due upon unpaid subscriptions be not required to meet the corporate liabilities, then only so much as is requisite can be collected in an action instituted by the creditors of the company.¹ Neither are the shareholders to be charged with the payment of debts due to corporate creditors who neglect to appear and prove their claims.² Where, subsequently to an assignment made by a

corporation for the benefit of its creditors, suit to collect unpaid subscriptions is instituted, and evidence of an assessment is adduced, recovery can be had only in case the whole of the unpaid subscriptions is needed for the payment of the corporate debts.³ A suit by corporate creditors, to obtain satisfaction of their claims by enforcing the payment of the unpaid balance due on stock, is a proceeding to enforce the equitable obligations of the shareholders; and, since it is competent to call in only so much of the unpaid capital as is necessary to discharge the debts, and that only after the exhaustion of all other assets, there should be an account taken of the amount of debts, assets and unpaid capital, and a decree made for an assessment on each shareholder of the amount due from him.⁴ A shareholder who has been compelled to pay more than his just proportion of the corporate debts, is entitled to contribution from the other shareholders.⁵ Accordingly the defendant stockholders may file a cross-bill to bring in all other delinquent stockholders, within the jurisdiction of the court.⁶ For upon plain principles of equity, if all the parties who are liable have not been brought before the court, those who are defendants of record cannot be charged with the liability which should devolve upon those who are absent, unless it be shown that they are insolvent, or beyond the jurisdiction of the court.⁷ And it is competent to adduce evidence as to whether or not there is any property in the hands of the assignee, for the benefit of creditors, which can be applied in satisfaction of the claim; and, in Wisconsin, when such property cannot be found, the court may, in accordance

with the statute,¹ find out the respective liabilities of the shareholders and enforce the same by judgment, without a receiver being appointed, or the proceedings being stayed, before it is ascertained whether there is to be any dividend made by the assignee to the creditors.² But although the corporation may have assets consisting of debts owing it from other parties, the creditors will not be required to await the collection of doubtful claims, or claims in litigation. "The shareholders must pay and pay promptly, and take upon themselves the *onus* of delay and risk as to all such cases."¹⁰

1 Appeal of Bell, 115 Pa. St. 88.

2 Richmond v. Irons, 121 U. S. 27.

3 Citizens' etc. Trust Co. v. Gillespie, 115 Pa. St. 564.

4 Appeal of Bell (1887), 115 Pa. St. 88.

5 Holmes v. Sherwood, 3 McCrary, 406; Marsh v. Burroughs, 1 Woods, 463; Stover v. Plack, 30 N. Y. 64; Aspinwall v. Torrence, 1 Lans. 381; Masters v. Rosale etc. Mining Co. 2 Sand. Ch. 301; Slee v. Bloom, 19 Johns. 454, 10 Am. Dec. 273; Farron v. Bivings, 13 Rich. Eq. 25; Millaudon v. New Orleans etc. R. R. Co. 3 Rob. (La.) 488; Matthews v. Albers, 24 Md. 527; Middletown Bank v. Magill, 5 Conn. 28; Erickson v. Nesmith, 48 N. H. 371; 77 Am. Dec. 78; Hadley v. Russell, 40 N. H. 109; Brinham v. Willersburg Coal Co. 47 Penn. St. 43; Umsted v. Buskirk, 17 Ohio St. 113; Meissner v. Thompson, 9 Bradw. 368; S. C. sub. nom. Thomson v. Meissner, 108 Ill. 359; Wincock v. Turpin, 96 Ill. 135; Stewart v. Lav, 5 Iowa, 604. Cf. Andrews v. Coffender, 13 Pick. 484; Gray v. Coffin, 9 Cush. 192; Sutton's Case, 3 De Gex & S. 262.

6 Hatch v. Dana, 101 U. S. 205; Woods v. Dummer, 3 Mason, 307; Marsh v. Burroughs, 1 Woods, 463; Holmes v. Sherwood, 3 McCrary, 406; Masters v. Rosale etc. Mining Co. 2 Sand. Ch. 301; N. Y. Code of Civil Procedure, §§ 3701-3704; Hadley v. Russell, 40 N. H. 109; Umsted v. Buskirk, 17 Ohio St. 113; Hodges v. Silver Hill Mining Co. 9 Or. 200.

7 Marsh v. Burroughs, 1 Wood, 463; Wood v. Dummer, 3 Mason, 307; Bonewitz v. Van Wert County Bank, 41 Ohio St. 78; Cook on Stock & Stockh. § 206. Cf. Erickson v. Nesmith, 48 N. H. 371; 77 Am. Dec. 78; Holmes v. Sherwood, 3 McCrary, 406.

8 Wis. Rev. Stat. 1878, § 3224.

9 Sleeper v. Goodwin, 57 Wis. 577.

10 Moses v. Ocoee Bank, 1 Lea, 398, 414. Acc. Stark v. Burke, 9 La. An. 341.

§ 421. **Liability for laborers' wages.**—In several States a personal liability is imposed by statute upon

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on the members of a corporation for debts due laborers for services performed during a certain number of days.¹ Thus, in New York, it is provided by the General Railroad Act of 1850 that all shareholders of any company formed thereunder shall be jointly and severally liable for the debts due or owing to any of the laborers or servants of the company, other than contractors, for personal services for thirty days' service performed for the company; but that they shall not be liable to an action therefor before an execution against the corporation shall be returned unsatisfied in whole or in part; and that the amount due on the executions, together with costs, shall be the amount recoverable from the stockholders. Before the laborer or servant, however, shall charge a stockholder for the thirty days' services, he shall give him notice in writing within twenty days after the performance of the service, that he intends to hold him liable, and shall commence his action therefor within thirty days after the return of the execution unsatisfied, as mentioned above. A stockholder who has been compelled to pay for labor or services under this act is entitled to contribution from the other stockholders.² By a subsequent act, laborers or servants, other than contractors, are entitled to recover for ninety, instead of thirty, days' service, from the stockholders, under the same conditions as those set forth above.³ In Wisconsin, an action for wages may be maintained against the shareholders without a judgment against the corporation having been proved.⁴ The right to maintain an action for wages against the shareholders will not be destroyed by a mere dissolution of the corporation, by suspension of business,

or assignment in the interest of the corporate creditors.¹ A servant of an insolvent corporation cannot be regarded as having waived his right of action against the shareholders individually, by the mere act of presenting his claim for wages so as to be entitled to a dividend from the assignee.² The Wisconsin statute,³ subjecting shareholders to personal liability for the services of servants, has been held to include within its meaning the foreman of a corporation, even though he may not perform actual manual labor.⁴

1 *H. p. N. Y. Laws of 1850, ch. 140, § 19, as amended by N. Y. Laws of 1851, ch. 232, and by N. Y. Laws of 1875, ch. 392, § 8; Wis. Rev. Stat. (1878) § 1769.*

2 *N. Y. Laws of 1850, ch. 140, § 10, as amended by N. Y. Laws of 1854, ch. 232, repealing all other laws whereby the stockholders, officers and agents of any railway company are made individually liable for the debts or liabilities of the corporation beyond the provisions contained.*

3 *N. Y. Laws of 1875, ch. 392, § 8.*

4 *Sleeper v. Goodwin, 67 Wis. 577.*

5 *Sleeper v. Goodwin, 67 Wis. 577.*

6 *Sleeper v. Goodwin, 67 Wis. 577.*

7 *Wis. Rev. Stat. 1878, § 1769.*

8 *Sleeper v. Goodwin, 67 Wis. 577.*

§ 422. **Of the futility of attempts to avoid liability upon stock.**—All attempts made by shareholders to avoid liability to corporate creditors upon the unpaid balance due on their shares, as by procuring a cancellation of the contract of subscription and a release from the corporation,¹ or by submitting to a forfeiture for the non-payment of calls,² or by transferring their shares,³ are regarded by the courts with suspicion; and but slight evidence of a fraudulent intent to escape liability is sufficient to have such transactions set aside and to subject the shareholders to the claims of the corporate creditors.⁴ Indeed, it has been said not to be within the

ingenuity of man to devise a scheme to prevent courts of equity from enforcing the payment of unpaid subscriptions to capital stock for the benefit of corporate creditors.¹

1 *Vide supra*, §§ 114, 144.

2 *Vide supra*, §§ 114, 144, 183.

3 *Vide supra*, §§ 144, 372.

4 *County of Morgan v. Allen*, 103 U. S. 486; *Sawyer v. Hoag*, 17 W. 2d 616; *Putnam v. City of New Albany*, 4 Blm. 58; *In re South Mountain Mts. Mining Co.*, 7 Sawy. 33; *Chouteau v. Dean*, 7 Mo. App. 217; *Call v. Ball*, 72 Mo. 424; *Union Ins. Co. v. Frear Stone Manuf. Co.*, 67 Ill. 327; *Jackson v. Tract*, 64 Iowa, 449; *Singer v. Given*, 61 Iowa, 80.

5 *Upton v. Hensbrough*, 3 Blm. 417, 425; *Cook on Stock & Stockh.*, § 192. A stockholder and director cannot plead the unconstitutionality of the act under which his company was incorporated in an action against him for unpaid calls. *Weisman v. Wilkesburg etc. Ry. Co.*, 118 Pa. 123.

§ 423. The same subject, continued.—Of agreements to issue stock at less than par.—In America corporate creditors are not bound by any agreement between the corporation and any holder of its stock to accept less than the par value thereof,¹ or property or services, as payment in full.² Thus a contractor, part of whose remuneration for constructing the works of a corporation consisted of the company's stock at fifty per centum of its par value, is liable thereon to corporate creditors. The creditors are not bound by the contract between the company and the contractor as to the price of the works, and only to the extent of the reasonable value thereof can the latter avoid payment of the balance due on the par value of the stock.³ Likewise where a railroad company issued certificates of its stock of the face value of \$350,000 in satisfaction of a debt of \$70,000 which it was unable otherwise to discharge, the recipients were declared liable, as stockholders, to the company's creditors for the eighty per cent of the par value yet remaining.⁴ So again, the Iowa

statute,⁵ subjecting shareholders to liability for the amount of their unpaid stock, has been held to extend to the amount of stock paid for by the transfer of a worthless patent.⁶ For in America the capital stock of a corporation is regarded as a trust fund for the security of corporate creditors;⁷ although in England this doctrine is not recognized,⁸ and in that country such arrangements between the corporation and its shareholders are not presumptively fraudulent.⁹

1 *Vide supra*, §§ 93, 252, 266.

2 *Vide supra*, §§ 99, 258, 261, 266. *Cf. Young v. Erie Iron Co.* 87 Tenn. 189.

3 *Shickle v. Watts*, 94 Mo. 410.

4 *Jackson v. Praer*, 84 Iowa, 468; 8. O. 52 Am. Rep. 449.

5 Iowa Code, § 1062.

6 *Chisholm v. Forny*, 66 Iowa, 332.

7 *Vide supra*, § 266.

8 *Vide supra*, § 267.

9 *Vide supra*, §§ 254, 267.

§ 424. **The registered holder liable.**—As a general rule, those whose names appear upon the books of the company as the holders of its stock are the persons to be subjected to liability thereon to corporate creditors.¹ Any person, deliberately permitting his name to stand in the books of a corporation as a stockholder thereof, will be estopped as against the corporation's creditors from denying that he is an owner of such stock.² The person registered as shareholder is liable upon the shares registered in his name, although he may be merely a trustee and be registered as such.³ And persons holding shares in trust for the company are personally liable to creditors.⁴ A person will be held liable on stock, which stands in his name on the

corporate books, which he appears to have voted on, and which he admits stood in his name and was held by him as collateral security for a debt.⁵ But where stock was entered upon the corporate books by the authority of a director in the name of his wife, and the director afterwards voted upon and represented the stock, there being no evidence that the wife authorized or ratified his acts or received any dividends from the stock or claimed any interest in it, her separate estate is not to be charged with any liability thereon.⁶ In an action to enforce a shareholder's individual liability, it is sufficient if it appear that he was a shareholder at the time of the institution of the action, without its being shown that he occupied that position at the time the cause of action arose.⁷ A proceeding by motion, brought by a corporate creditor in accordance with the Missouri statute,⁸ to enforce a shareholder's liability upon the unpaid balance due on his stock, does not abate on the death of the shareholder.⁹ But a distributee of the estate of a deceased shareholder, none of the shares having been distributed, cannot be subjected to liability as a shareholder by motion under the Missouri statute,¹⁰ on a judgment against the corporation, even though in the capacity of administrator he refused to inventory the stock, alleging that it was not an asset, but might become a liability.¹¹ The liability of transferees of stock issued for less than par or for services or property at an overvaluation, depends upon whether or not they took the stock with notice.¹² Accordingly, a creditor's bill in equity, to subject to liability holders of stock which is nominally paid up, but on

which nothing has really been paid, must allege that they took with notice of that fact.¹²

1 See cases cited *infra*, and also § 372 *supra*.

2 *Erskine v. Loewenstine*, 82 Mo. 301.

3 *Lumaden v. Duchanan*, 4 Macq. 950; *Muir v. City of Glasgow Bank*, 4 App. O. 337. See also the *Glasgow Bank Cases*, 4 App. O. 647.

4 *Preston v. Grand Collier Dock Co.* 11 Sim. 337. *In re Ennis & Co. R'y Co.* 3 Law R. Ir. 187, *Cree v. Somervail*, 4 App. O. 648.

5 *Sleeper v. Goodwin*, 67 Wla. 577.

6 *Longdale Iron Co. v. Pomeroy Iron Co.* 34 Fed. Rep. 448.

7 *Root v. Slincock*, 120 Ill. 350; 60 Am. Rep. 588.

8 Mo. Rev. Stat. § 735.

9 *Marks v. Hardy*, 86 Mo. 232.

10 Mo. Rev. Stat. § 735.

11 *Simmons v. Ellis*, 17 Mo. App. 470.

12 *Vide supra*, §§ 269, 270.

13 *Cleveland Rolling Mill Co. v. Texas &c. R'y Co.* 27 Fed. Rep. 250.

§ 425. **Corporate creditors must first exhaust their remedy against the company.**—Ordinarily, corporate creditors cannot proceed against the shareholders individually, until after a judgment against the corporation and the return of an execution wholly or partly unsatisfied,¹ unless the corporation has been dissolved,² or has made an assignment,³ or is notoriously insolvent.⁴ But shareholders, declared by the charter of the corporation to be severally liable to creditors for a certain per centum on their shares, may be proceeded against even before judgment is obtained against the corporation.⁵ Judgment and a return of execution unsatisfied, against a corporation in another State, is sufficient basis for a bill in a Missouri court of equity, to enforce a stockholder's liability to corporate creditors on unpaid stock.⁶ But a provision in the charter of a foreign corporation, that judgment against the corporation must be obtained, be-

4 Terry v. Tubman, 92 U. S. 185; Camden v. Dorenia, 3 How. 533; Reynolds v. Douglas, 12 Pet. 497; Kimber v. Bank of Fulton, 49 Ga. 419; Hodges v. Silver Hill Mining Co. 9 Or. 200.

5 Bird v. Calvert, 22 S. C. 292.

6 Shickle v. Watts, 94 Mo. 410.

7 Remington v. Samana Bay Co. 140 Mass. 494.

8 Merchants' Ins. Co. v. Hill, 18 Mo. 408.

9 Kan. Comp. Law, 1879, ch. 23, § 32.

10 Howell v. Mangelsdorf, 33 Kan. 194.

§ 426. The same subject, continued. — The creditor's right to proceed against the stockholder does not accrue upon the rendering of judgment against the corporation, but dates from the time when it is apparent that no corporate property exists to satisfy the demand.¹ While the return of an execution against the company, partly or wholly unsatisfied, is ordinarily the best evidence of the insufficiency of the corporate property to satisfy the demand,² yet it is not in all cases the only sufficient evidence thereof. Thus, it is held that it is not necessary to await the return day of the execution before instituting proceedings against the shareholders, where it may be shown *aliunde* that there is no corporate property upon which to levy.³

1 Ganetsville Bank v. Greene, 64 Iowa, 445.

2 See cases cited *infra*, § 425, note 1.

3 Knight v. Frost, 14 Mo. App. 331. But no priority can be gained by a creditor by his filing a motion, under the Missouri statute (Mo. Rev. St. § 736), for execution against a shareholder, before the return-day of the execution against the corporation: Marks v. Hardy, 86 Mo. 232.

§ 427. The judgment against the corporation conclusive as against the shareholders. — The judgment against the corporation can be impeached only for fraud and collusion, or for want of jurisdiction. The shareholder cannot set up by way of defense in the action against him matters which the

corporation might have plead, but which it failed to avail itself of;¹ such as that contracting the debt was *ultra vires*,² or that the service of process upon the corporation was defective.³ A shareholder is bound by a decree against the corporation, even though he failed to receive personal service, unless fraud be proven.⁴ But, of course, where a shareholder is liable only on a particular class of corporate debts, or only to a particular class of creditors, evidence will be received in an action against him to enforce his individual liability, that the claim sued upon is of a class upon which he is not liable.⁵ In New York, however, it is doubtful whether the judgment against the corporation be conclusive against the shareholder.⁶ And in other States there are cases which hold that the judgment against the corporation is only *prima facie* conclusive against the individual shareholders.⁷

1 *Graham v. Boston*, 20 R. R. Co. 117, N. Y. 141; *Glenn v. Springs*, 20 Fed. Rep. 494; *Binnett v. Hart*, 13 N. Y. 157; *Harvey v. Noyes*, 15 Fed. Rep. 202; *Marsh v. Burroughs*, 1 W. 442; *Griffin v. City of St. Louis*, 4 Dill. 24; *Stephens v. Fox*, 13 N. Y. 157; *W. v. B.*, 2 Johns. 114; *Lee v. B. C. & Johns*, 14 366; *H. v. W.*, 17 N. Y. 141; *Mason v. M. & J.*, 49 Me. 227; *M. v. W.*, 27 N. Y. 141; *W. v. W.*, 18 W. 141; *Lynch v. Coal Co.*, 43 Pa. 41; *W. v. W.*, 18 W. 141; *Bank of Worcester v. Stev.*, 10 N. Y. 141; *Henry v. Vernon*, 10 R. R. Co. 17; *Obie*, 17; *Hampden v. W.*, 41 N. Y. 141; *Am. Dec.* 114; *Conrad v. Tucker*, 5 Kan. 70; *Hart v. Vinton*, 10 N. Y. 141; *W. v. W.*, 18 W. 141; *J. (N. B.) Q. B.* 284; *Morgan v. W.*, 10 N. Y. 141.

2 *Sumner v. Marcy*, 3 Wood. & M. 100.

3 His remedy in such a case is by direct proceedings; *Wheeler v. Miller*, 24 Hun, 541; *Care v. Brigham*, 20 Me. 22. See, also, *Lonsville v. R. R. Co. v. Linton*, 2 How. 477; *Cook on Stock & Stockh.* § 298.

4 *Glenn v. Springs*, 20 Fed. Rep. 494.

5 *Conant v. Van Schaick*, 24 Barb. 67; *Wilson v. Stockholders*, 49 Pa. 474; *Larrabee v. Baldwin*, 25 Cal. 122; *Cook on Stock & Stockh.* § 298; *C/ Hudson v. Carman*, 41 Me. 84.

6 *Wheeler v. Miller*, 20 N. Y. 323; *S. C.* 24 Hun, 541; *Stephens v. Fox*, 13 N. Y. 157; *McMahon v. Macy*, 51 N. Y. 141; *Miller v. Watts*, 51 N. Y. 141; *Moss v. Averell*, 13 N. Y. 141; *Strong v. Wharton*, 31 Barb. 414; *Moss v. M. & J.*, 49 Me. 227; *W. v. W.*, 18 W. 141; *Mason v. O. & J.*, 49 Me. 227; *W. v. W.*, 18 W. 141; *Conrad v. Tucker*, 5 Kan. 70; *Hart v. Vinton*, 10 N. Y. 141; *W. v. W.*, 18 W. 141; *J. (N. B.) Q. B.* 284; *Morgan v. W.*, 10 N. Y. 141.

7 *Burger v. Williams*, 4 McLean, 577; *Stephens v. Fox*, 13 N. Y. 157.

Belmont v. Coleman, 1 Bosw 183. *Cf.* S. C. 21 N. Y. 96; *Merchants' Bank v. Chandler*, 19 Wis. 435; *Grund v. Tucker*, 5 Kan. 70. See, also, *Higelow on Estoppel*, 87; *Thompson on Liability of Stockholders*, § 329, note. *Cf.* *McMahon v. Macy*, 51 N. Y. 155, 155.

§ 428. *How enforced.*—(a). *By action at law.* It has been held by high authority that “no one creditor can assume that he alone is entitled to what any stockholder owes, and sue at law, so as to appropriate it exclusively to himself.”¹ In the case of an insolvent corporation, unpaid subscriptions are regarded as assets to be administered in the interest of all the creditors, so that the balance due on stock by an individual stockholder cannot be subjected to an attachment execution secured by one creditor against the corporation.² Where shareholders are liable to the corporate creditors as a class, the legal remedy is inadequate and the aid of equity must be invoked.³ But while this would seem to be the better rule, yet the weight of authority appears to be, that after unpaid subscriptions have been called, any one creditor may sue at law and recover the whole amount due from any one or more shareholders.⁴ He need not join all the creditors, nor all shareholders of the corporation as parties plaintiff and defendant to his action.⁵ A corporate creditor may reach so much of an unpaid subscription as has been called, by the garnishee process.⁶ And a sole corporate creditor, in whose favor judgment has been rendered, may maintain an action against shareholders, who have in their possession the assets of the corporation, and may seek a discovery, as against the corporation, of the names of such shareholders as have been withheld from him.⁷

1 *Patterson v. Lynde*, 105 U. S. 519. *Cf.* *Terry v. Little*, 101 U. S. 216.

2 *Lane v. Appel*, 105 Pa. St. 49; S. C. 51 Am. Rep. 166.

3 *Rounds v. McCormick*, 114 Ill. 252.

4 *Faull v. Alaska etc. Mining Co.* 8 Sawy. 420; *Wilbur v. Stockholders*, 18 Bank. Reg. 178; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 479; *Bank of the United States v. Dallam*, 4 Dana, 574; *Allen v. Montgomery etc. R. R. Co.* 11 Ala. 437; *McCarthy v. Lvasche*, 89 Ill. 270; 31 Am. Rep. 85; *White v. Blum*, 4 Neb. 555. *Cf. Holmes v. Sherwood*, 3 McCrary, 405; S. C. 16 Fed. Rep. 725; *Corning v. Mohawk Valley Ins. Co.* 11 How. Pr. 191; and see *Van Buren v. Chenango Ins. Co.* 12 Barb. 675.

5 *Brundage v. Monumental etc. Co.* 12 Or. 322.

6 *Faull v. Alaska etc. Co.* 8 Sawy. 420; *Curry v. Woodward*, 53 Ala. 371; *Lingham v. Rushing*, 5 Ala. 403; *Brown v. Union Ins. Co.* 3 La. An. 17; *Hannah v. Moberly Bank*, 67 Mo. 678; *Simpson v. Reynolds*, 11 Mo. 59; *Burn's Appeal*, 105 Pa. St. 49; *Hays v. Lycoming etc. Co.* 99 Pa. 21. 621; *Meints v. East St. Louis etc. Co.* 89 Ill. 48. See, also, *Dean v. Biggs*, 25 Hun. 122; *Coalfield Coal Co. v. Peck*, 98 Ill. 139. *Cf. Rand v. White Mountain R. R. Co.* 40 N. H. 79; *Hughes v. Oregonian R'y Co.* 11 Or. 158; *Peterson v. Sinclair*, 83 Pa. St. 250; *Langford v. Ottumwa Water Power Co.* 59 Iowa, 283; *In re Glen Iron Works*, 20 Fed. Rep. 674; S. C. 17 Fed. Rep. 324; *Chandler v. Sidule*, 10 N. B. Rep. 236.

7 *Brewer v. Michigan Salt Assoc.* 58 Mich. 351.

§ 429. (b). **By bill in equity.**—A bill in equity, however, so framed as that all other creditors may come in as parties plaintiff,¹ and making the corporation,² and all the solvent stockholders within the jurisdiction of the court known to the plaintiff, parties defendant,³ is the corporate creditor's usual,⁴ and in some States his only, remedy.⁵ A case for equitable relief is made out by a creditor's bill against the shareholders of a corporation, which alleges that the corporation is insolvent, that the shareholders are subject to personal liability, and that the assets are being wasted by the institution by many creditors of separate suits at law.⁷ When one such bill has been filed, the court will not allow other creditors to file similar bills, but will require them all to join in one proceeding.⁷ A bill will not be held defective merely because it fails to make all the delinquent stockholders parties defendant.⁸

1 *Patterson v. Lynde*, 106 U. S. 519; *Terry v. Little*, 101 U. S. 216; *Mills v. Scott*, 99 U. S. 25; *Brown v. Fisk*, 23 Fed. Rep. 228; *Holmes v. Sherwood*, 3 McCrary, 405; *Pollard v. Bailey*, 20 Wall. 520; *Sawyer v.*

Hong, 17 Wall. 616; Mann v. Penta, 3 N. Y. 416; Masters v. Ready etc. Mining Co. 3 Sand. Ch. 291; Morgan v. New York etc. R. & Co. 13 Paige, 250. 63 Am. Dec. 244; Cruise v. Babcock, 10 Met. 225; Weatherston v. Baker, 25 N. J. Eq. 471; United v. Bunker, 17 Ohio St. 113; Carpenter v. Martin, Bank 14 Wis. 100; Coarson v. White, 14 Wis. 700; 63 Am. Dec. 797. If the other creditors do not elect to join it is immaterial, for although proper parties to the suit they are not necessary parties. Hatch v. Davis, 11 C. & F. 270; March v. Burroughs, 1 Woods, 443; Cruise v. Babcock, 10 Met. 225. C/ Adler v. M.L. Wooten etc. Co. 13 Wis. 67.

2. Walsh v. Memphis etc. R. R. Co. 3 McVary 126; Mann v. Penta, 3 New York 416; Voss v. Lane, 41 Minn. 681; Hedley v. Russell, 63 N. H. 100; Eragon v. Nunnah, 64 N. H. 271; 77 Am. Dec. 76; United v. Bunker, 17 Ohio St. 113; Parnes v. Milwaukee etc. Co. 24 Wis. 226; Adams v. White, 14 Wis. 700; 63 Am. Dec. 797; Carpenter v. Martin Bank 14 Wis. 700. C/ Young v. New York etc. Steamship Co. 16 Abb. Pr. 270. A 14th solvent stockholder v. this the justification must be) and, except when this will be excused upon an allegation that the number is too great. Vick v. Lane, 64 Minn. 681, 684. C/ Bonowitz v. Vanvorst Co. Bank, 41 Ohio St. 78.

3. Walsh v. Memphis etc. R. R. Co. 3 McVary 126; Mann v. Penta, 3 New York 416; Voss v. Lane, 41 Minn. 681; Hedley v. Russell, 63 N. H. 100; Eragon v. Nunnah, 64 N. H. 271; 77 Am. Dec. 76; United v. Bunker, 17 Ohio St. 113; Parnes v. Milwaukee etc. Co. 24 Wis. 226; Adams v. White, 14 Wis. 700; 63 Am. Dec. 797; Carpenter v. Martin Bank 14 Wis. 700. C/ Young v. New York etc. Steamship Co. 16 Abb. Pr. 270. A 14th solvent stockholder v. this the justification must be) and, except when this will be excused upon an allegation that the number is too great. Vick v. Lane, 64 Minn. 681, 684. C/ Bonowitz v. Vanvorst Co. Bank, 41 Ohio St. 78.

4. Hatch v. Dana, 10 U. S. 200; Sanger v. Upton, 51 U. S. 20; March v. Burroughs, 1 Woods, 443; Helman v. Sherwood, 3 McVary 406; R. U. 16 Fed. Rep. 25; Stevens v. Fox 63 N. Y. 223; 8 C. 17 Hun. 453; Pohl v. Simpson, 74 N. J. 17; Griffith v. Mangum, 73 N. Y. 61; Mathes v. Meddie, 13 N. Y. 130; Mann v. Penta, 3 N. Y. 416; Ingham v. R. R. Co. v. McCannell 35 Ga. 191; Hightower v. Thornton 5 Ga. 48; 62 Am. Dec. 472; Hightower v. Houston 5 Ga. 500; Curry v. Woodward, 63 Ala. 371; Allison v. Montgomery etc. R. R. Co. 11 Ala. 407; Crawford v. Retros. 20 Md. 602; Germantown etc. R. Co. v. Fisher 60 Pa. St. 126; 100 Am. Dec. 546; Wincock v. Turpin, 9, 11, 120; Harmon v. Page, 68 Cal. 466. C/ Sherwood v. Buffalo etc. R. R. Co. 12 How. Pr. 137.

5. Turry v. Little, 101 U. S. 236; Pollard v. Bailey, 20 Wall. 220; Smith v. Huchison, 43 Ala. 191; Jones v. Jorison, 31 Ark. 223; Harris v. First Parish in Dorchester 23 Pick. 113; Knowlton v. Akeley 6 Conn. 62; Stoughton v. Norweth, 134 Cong. 231, 97 Am. Dec. 76; United v. Bunker, 17 Ohio St. 113. C/ Spurr v. Grant, 14 Mass. 9; Hodges v. Oliver Hill Mining Co. 9 Or. 200.

6. Judson v. Schuttler, 134 Ill. 158.

7. O'neal v. Palmer, 10 Met. 225; Cook on Stock & Stocks. § 311. But see Perry v. Turner 68 Mo. 416.

8. Hatch v. Dana, 10 U. S. 200; Ogilvie v. Knox Iron Co. 20 How. Pr. 20; March v. Burroughs, 1 Woods, 443; Helman v. Sherwood, 3 McVary. 406; Griffith v. Mangum, 73 N. Y. 61; Harbath v. Drew 27 N. Y. 601; Quinn v. Williams, 60 Md. 28; Brundage v. Monumental etc. Mining Co. 13 Or. 312; C/ Von Schmidt v. Huntington, 1 Cal. 66; Lamar Iron Co. v. Gulick, 160 Ill. 41.

§ 400. A call unnecessary in case of corporate insolvency. — In England the courts have, at the instance of corporate creditors, compelled the directors of a corporation to issue a call for unpaid sub-

scriptions by *mandamus*,¹ but it is doubtful whether the writ would be granted by the American courts.² For while a call is generally necessary to render the obligation to pay absolute,³ yet after the corporation has become insolvent it is unnecessary, inasmuch as a court of equity may then enforce the collection of the unpaid subscriptions without the intervention of the corporate management.⁴ Where an assignment for the benefit of its creditors has been made by a corporation, it is competent for the court in chambers during vacation to authorize by order the collection of all the unpaid balance due on stock.⁵

1. *Queen v. Victoria Park Co.*, 1 Ad. & E. N. S. 544; *Queen v. Ladysard*, 1 Ad. & E. N. S. 616; *King v. St. Katherine Dock Co.*, 4 Barn. & Adol. 321.

2. *Hatch v. Dana*, 101 U. S. 205; *Dalton etc. R. R. Co. v. McDaniel*, 8 Ga. 191. *Cf. Occumer v. Union Ins. Co.*, 2 Rob. (La.) 573; *Allen v. Montgomery etc. R. R. Co.*, 11 Ala. 437.

3. *Vide supra*, §§ 150, 151.

4. *Vide supra*, § 152. *Scovell v. Tayer*, 105 U. S. 143, 155; *Hatch v. Dana*, 101 U. S. 205, 214; *Chubb v. Upton*, 85 U. S. 663; *Snapper v. Upton*, 91 U. S. 50; *Moss v. Burroughs*, 1 Woods, 463; *Wilbur v. Stockholders*, 18 Bank Reg. 17. *Myers v. Seeley*, 10 Bank Reg. 411; *Curry v. Woodward*, 53 Ala. 37; *Curry v. Seeley*, 28 Ala. 159; 64 Am. Rep. 92. *Robinson v. Bank of Marion*, 19 Ga. 346; *W. v. Williams*, 60 Md. 93; *Ward v. Grawoodville Manuf. Co.*, 10 Ohio, 17; *Henry v. Vermillion etc. R. R. Co.*, 17 Ohio, 157. *Cf. Gormantown etc. R. R. Co. v. Fittley*, 60 Penn. St. 124; *Chandler v. Keith*, 42 Iowa, 96; *M. v. Potts*, 3 N. Y. 415; *Ogilvie v. Knox Ins. Co.*, 23 How. 380; *Arthur v. Milwaukee Manuf. Co.*, 13 Wis. 62. And see *Seymour v. Sturgess*, 26 N. Y. 134; *Wheeler v. Malar*, 90 N. Y. 353.

5. *Citizens' etc. Trust Co. v. Gillespie*, 115 Pa. St. 564.

§ 431. **Limitation upon the shareholders' liability.**—As a general rule the statute of limitations begins to run on unpaid subscriptions to stock from the date upon which a call thereon falls due;¹ if no call be made by the company, then the shareholder's liability dates only from the time of some authorized demand upon him for payment, or some order of court, and it is clear that the statute does not begin to run in his favor until such an order

or demand be made,¹ or, it would seem, from the time of the dissolution of the company;² but insolvency is said not to set the statute of limitations in operation in the absence of a judgment of dissolution.³ The statute of limitations runs upon corporate debts in favor of the shareholders, not from the maturity of the debt but from the time of the dissolution of the corporation.⁴ In a late case in California, where the creditors of a corporation proposed to rely upon the shareholders, it was held that, under the statute⁵ limiting the time for the institution of an action against them to three years "after the discovery by the aggrieved party of the fact upon which . . . the liability was created," it is their duty to examine the corporate books to discover the condition of the stock; and the books being open to their inspection they will be charged with any knowledge which they might have obtained by such examination, and the time will be deemed as commencing to run when the debt is incurred.⁷

1 *Curry v. Woodward*, 63 Ala. 376; *Glenn v. Williams*, 60 Md. 23; *Baltimore etc. Turnpike Co. v. Barnes*, 6 Har. & J. 87.

2 *Scovill v. Thayer*, 106 U. S. 155.

3 See *Gillfillan v. Union Canal Co.* 109 U. S. 401; *Terry v. Anderson*, 96 U. S. 628; *Terry v. Tuhman*, 92 U. S. 156; *Glenn v. Dorahelmer*, 24 Fed. Rep. 693; S. O. 23 Fed. Rep. 695; *Payne v. Bullard*, 23 Miss. 83; 65 Am. Dec. 74; *Harmon v. Paige*, 62 Cal. 448.

4 *Hollingshead v. Woodard*, 35 Hun. 410.

5 *Garesche v. Lewis*, 93 Mo. 197.

6 C.L. Code Civ. Proc. § 359.

7 *Moore v. Boyd*, 74 Cal. 67.

CHAPTER XVIII.

STOCKHOLDERS' MEETINGS.

- § 432. Shareholders can act only in meeting assembled.
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§ 432. Shareholders can act only in meeting assembled.—Ordinarily, there are only two ways in which a corporation can act, to wit, either through its president and directors, or at a meeting of the stockholders duly convoked;¹ accordingly, where an assent of the stockholders to any proposition

be given not in a meeting, but by each one separately, and at different times, and the evidence thereof be not the minutes of their meeting, but a separate paper in the hands of a committee, it is no legal evidence of the consent of the corporation.¹ It is provided, however, by statute in New York, that it shall be immaterial whether shareholders of a railroad not exceeding ten miles in length, give their consent to a lease of the road individually in writing, or at a stockholders' meeting.²

1 *Pierce v. New Orleans Building Co.* 9 La. 397, 404.

2 *Pierce v. New Orleans Building Co.* 9 La. 397, 405; *Commonwealth v. Outten*, 13 Penn. St. 133; 53 Am. Dec. 450; *Finlay Shooete. Co. v. Kuntz*, 34 Mich. 89. Cf. *Graham v. Boston etc. R. R. Co.* 118 U. S. 161; *Granger v. Grubb*, 7 Phila. 350.

3 N. Y. Laws of 1880, ch. 349, § 1.

§ 433. **The time of meeting.**—Stockholders' meetings must be held at the time appointed,¹ or within a reasonable time thereafter.² A delay of one hour and five minutes has been held not to be unreasonable, although during that interval some of the stockholders may have gone away.³ But a meeting called to order and organized before the hour appointed is held to be a surprise and a fraud upon those stockholders who were not present at that time.⁴ The time appointed for stockholders' meetings must be reasonable.⁵ Upon this principle an injunction has been granted to restrain directors from fixing a general meeting for a day when the votes of the majority of the shareholders would not be available by reason of their being in the country at that time.⁶ It is enacted by the English Companies' Clauses Act of 1845, that the first general meeting of the shareholders of the company shall be

held within the time prescribed by the act of incorporation, or if no time be prescribed, within one month after the passing of the special act of incorporation, and the future general meetings shall be held at the prescribed periods, and if no periods be prescribed, in the months of February and August in each year, or at such other stated periods as shall be appointed for that purpose by an order of a general meeting.⁷ In New York, when the directors neglect for sixty days after the first year of the corporate existence to adopt a by-law providing for the annual election of directors, the stockholders may elect directors instead of those holding over.⁸

1 *State v. Bonnell*, 35 Ohio St. 10.

2 *South School District v. Blakeslee*, 13 Conn. 227, 235. As to postponements and adjourned meetings, see *People v. Batchelder*, 22 N. Y. 126; *State v. Bonnell*, 35 Ohio St. 10; *Hardenburgh v. Farmers' etc. Bank*, 3 N. J. Eq. 68. See also the following section.

3 *South School District v. Blakeslee*, 13 Conn. 227, 235.

4 *People v. Albany etc. R. R. Co.* 55 Barb. 344, where the meeting was organized fifteen minutes before the designated hour, and its proceedings were held to be irregular and void: *Cook on Stock & Stockh.* § 590.

5 *Cannon v. Trask*, Law R. 20 Eq. 669.

6 *Cannon v. Trask*, Law R. 20 Eq. 669; *Browne & Theobald's Railway Law*, 104.

7 8 Vict. ch. 16, § 66.

8 N. Y. Laws of 1835, ch. 489, § 3, where specific directions are given as to the holding of meetings for that purpose.

§ 434. Of adjourned meetings, and postponement of time of meeting.—The proceedings of adjourned meetings are in every respect as valid as those of the original meeting,¹ without additional notice thereof;² unless the adjournment was fraudulently effected for the purpose of preventing a portion of the stock from being represented.³ In England it is provided by the Companies' Clauses Act of 1845 that no business shall be transacted at any adjourned meeting other than the business left

unfinished at the meeting from which such adjournment took place.⁴ It is provided by statute in New York that in case an election of directors of any incorporated company be not held at the appointed time, it may be held within sixty days thereafter.⁵ This statute has been declared to be directory merely; and accordingly, where an election was not held until more than two years after the time appointed, it has been considered legal.⁶ The directors of any railroad company in New York, the time of whose annual election is fixed within three months before September 30, may postpone the time to not more than two months after September 30, and thereafter the election shall be held on the day so designated, the directors in office at the time the change is made holding over.⁷ The stockholders also may, under certain restrictions, change the time and place of holding the annual election.⁸

1 *Smith v. Law*, 21 N. Y. 296; *Warner v. Mower*, 11 Vt. 385; *Schoff v. Bloomfield*, 8 Vt. 472; *Garrar v. Parley*, 7 Me. 404; *Granger v. Grubb*, 7 Phila. 350. *Cf.* *People v. Batchelor*, 22 N. Y. 128; *Queen v. Grimshaw*, 10 Q. B. 747.

2 *United States v. McKelden*, 8 Am. Rep. 778; *People v. Batchelor*, 22 N. Y. 128; *Smith v. Law*, 21 N. Y. 296; *Warner v. Mower*, 11 Vt. 385; *Schoff v. Bloomfield*, 8 Vt. 472; *Farrar v. Parley*, 7 Me. 404; *Queen v. Grimshaw*, 10 Q. B. 747; *Wills v. Murray*, 4 Ex. 843; 8 Q. 19 *Law J. Ex.* 209; *Rex v. Carmathen*, 1 Maule & B. 702; *Scadding v. Loran*, 3 H. L. Cas. 418.

3 *State v. Bonnell*, 35 Ohio St. 10.

4 8 Vict. ch. 16, § 74.

5 1 N. Y. Rev. Stat. 604, § 8.

6 *Beardsley v. Johnson*, 49 Hun. 607.

7 N. Y. Laws of 1875, ch. 593, § 1.

8 N. Y. Laws of 1885, ch. 498, § 1; N. Y. Laws of 1881, ch. 317, § 1.

§ 435. Of the place of meeting—the general rule.—If a particular place of meeting be prescribed by the corporate charter or by-laws, the proceedings of a meeting held at a different place will be

invalid.¹ The stockholders of a company incorporated in more than one State may hold meetings in any of them;² and their proceedings will be "valid in respect to the property of the corporation in all of them, without the necessity of a repetition of the meeting in any other of those States."³ But as a general rule, the stockholders of a company incorporated in only one State, must hold their meetings within the bounds of the sovereignty granting the charter.⁴ The reason of this rule is said to be that as a corporation is a creature of the law; where that ceases to exist, it can have no existence: accordingly, it must dwell in the place of its creation, and cannot migrate to another sovereignty, nor perform any of those corporate acts which are essential to the existence and continuation of the corporation itself, beyond the boundaries of the State from whose laws it derives its being.⁵ Upon this line of reasoning it is held, that the proceedings of stockholders' meetings held beyond the boundaries of the incorporating State, are absolutely void.

1 *American etc. Society v. Pilling*, 24 N. J. 317, 653. *Cf.* *McDaniels v. Flower Brook Manuf. Co.* 22 Vt. 274; where it was held, that the meetings must be at the usual place. See *Cook on Stock & Stockh.* § 591. All meetings, whether ordinary or extraordinary, shall be held in the prescribed place, if any, and if no place be prescribed, then at some place to be appointed by the directors: 8 Vict. ch. 16, § 66.

2 *Graham v. Boston etc. R. R. Co.* 118 U. S. 161; *Covington etc. Bridge Co. v. Mayer*, 31 Ohio St. 317. *Cf.* *Culbertson v. Wabash Navigation Co.* 4 McLean, 544; *Richardson v. Vermont etc. R. R. Co.* 44 Vt. 613. *Contra*, *Aspinwall v. Ohio etc. R. R. Co.* 20 Ind. 492; 83 Am. Dec. 320.

3 *Graham v. Boston etc. R. R. Co.* 118 U. S. 161.

4 *Ormsby v. Vermont etc. Co.* 56 N. Y. 623; *Franco-Texan Land Co. v. Laigle*, 59 Texas, 339; *Smith v. Silver Valley etc. Co.* 64 Md. 85; S. O. 10 Am. & Eng. Corp. Cas. 1; 54 Am. Rep. 160; *Hilles v. Parrish*, 14 N. J. Eq. 380; *Miller v. Ewer*, 27 Me. 509; 46 Am. Dec. 619. See also *La Fayette Ins. Co. v. French*, 18 How. 404; *Farnum v. Blackstone etc. Corporation*, 1 Sumn. 46; *Day v. Newark etc. Manuf. Co.* 1 Blatchf. 628; *Plimpton v. Bixelow*, 93 N. Y. 592, 598; *Stevens v. Phoenix Ins. Co.* 41 N. Y. 149; *Merrick*

v. Van Santvoord, 34 N. Y. 208, 218; *Reichwald v. Commercial Hotel Co.* 108 Ill. 439.

5 *Bank of Augusta v. Earle*, 13 Pet. 519; *Smith v. Silver Valley etc. Co.*, 61 Md. 85; *Morawetz on Corporations* (2nd edition), § 436; *Wood on Railways*, § 130, p. 341. Thus, a corporation chartered in one State cannot be organized in another: *Freeman v. Machias Water Power etc. Co.* 38 Me. 343; *Camp v. Byrne*, 41 Mo. 525. But see *Heath v. Silverthorn Lead etc. Co.* 30 Wis. 143, as to estoppel of the corporation to deny extra-territorial acts, to the injury of third parties.

6 *Wood v. Hydraulic etc. Co.* 45 Ga. 35; *Hilles v. Parrish*, 14 N. J. Eq. 330; *Aspinwall v. Ohio etc. R. R. Co.* 20 Ind. 492, 497; 18 Am. Dec. 329; *Freeman v. Machias Water Power etc. Co.* 33 Me. 343; *Miller v. Ewer*, 27 Me. 509; 45 Am. Dec. 619; *Ormsby v. Vermont Copper etc. Co.* 55 N. Y. 623; *Merrick v. Brainard*, 38 Barb. 574; *S. C. sub nom. Merrick v. Van Santwood*, 34 N. Y. 208.

§ 436. **The same subject, continued—The contrary rule.**—The soundness of this reason, however, has been questioned, and it has been suggested that the practical foundation of the rule is in the hardship and fraud which might be entailed upon shareholders by permitting corporate meetings to be held out of the State.¹ If the latter be the true reason of the rule—and there is high authority for believing that it is²—the proceedings of meetings held out of the incorporating State are to be considered voidable rather than void, and, as in the case of other voidable acts, capable of ripening into validity by the acquiescence of all the shareholders,³ or by subsequent ratification at a meeting properly held,⁴ or by legislative sanction, where the legislature might in the first instance have authorized the meeting so to be held.⁵ But, at any rate, the corporation itself will not be heard to say that the contracts of its officers were invalid because they were elected at a meeting held beyond the limits of the State;⁶ nor can a participating shareholder take advantage of that fact;⁷ although it would seem that a dissenting shareholder may attack the proceedings as irregular and as in fraud of his rights,

unless, by failure to take any action within the time prescribed by the statute of limitations, his remedy be barred.⁸ If a corporation migrate from the sovereignty from which it derives its charter, although its organization may remain apparently the same, it ceases to be a corporation, and its shareholders become liable as partners.⁹

1 Taylor on Corporations (2nd ed. 1869), § 382.

2 Taylor on Corporations (2nd ed. 1869), § 382.

3 *Camp v. Byrne*, 41 Mo. 575. Thus, where all the members of a corporation deriving its charter from the State of Maine resided in New Hampshire and held their meetings in the latter State, their proceedings were considered legal. *Coop v. Lamb*, 19 Me. 312.

4 *Ohio etc. R. R. Co. v. McPherson*, 35 Mo. 13; 38 Am. Dec. 128; *Freeman v. Machine Water Power etc. Co.* 33 Mo. 343.

5 *Graham v. Boston etc. R. R. Co.* 118 U. S. 161, 173, affirming 8 C. 11 Fed. Rep. 753. *Cf. Anderson v. Santa Anna*, 116 U. S. 356; *Grenada Co. v. Drogien*, 112 U. S. 371; *Howe v. Freeman*, 14 Gray, 566; *Shaw v. Norfolk R. R. Co.* 5 Gray, 161.

6 *Heath v. Silverthorn Lead etc. Co.* 39 Wis. 146.

7 *Camp v. Byrne*, 41 Mo. 575; *Ohio etc. R. R. Co. v. McPherson*, 35 Mo. 13; 38 Am. Dec. 128.

8 *Ormsby v. Vermont Copper etc. Co.* 56 N. Y. 623; *Cook on Stock & Stockh.* § 592.

9 *Merrick v. Van Santvoord*, 34 N. Y. 208; *Merrick v. Brahmard*, 38 Barb. 514.

§ 437. **Extraordinary meetings.**—In England it is enacted that every general meeting of the shareholders, other than an ordinary meeting, shall be called an "extraordinary meeting," and such meetings may be convened by the directors at such times as they think fit.¹ And it shall be lawful for twenty or more shareholders, holding in the aggregate not less than one-tenth of the capital of the company, by writing under their hands at any time, to require the directors to call an extraordinary meeting of the company, and such requisition shall fully express the object of the meeting required to be called, and shall be left at

he office of the company, or given to at least three of the directors, or left at their last or usual places of abode, and forthwith upon the receipt of such requisition the directors shall convene a meeting of the shareholders; and if for twenty-one days after such notice the directors fail to call such meeting, the prescribed number, or such other number as aforesaid, of shareholders, qualified as aforesaid,¹ may call such meeting, by giving fourteen days' public notice thereof.² But no extraordinary meeting shall enter upon any business not set forth in the notice upon which it shall have been convened.³ Directors are bound to give full notice of the objects for which an extraordinary meeting is required to be held; and though the requisition may be so expressed that resolutions following its precise terms might be illegal, the directors are not entitled to limit the notice, if the objects stated in the requisition can be carried out in a legal manner. If the directors send out an insufficient notice, the requisitionists may treat the meeting as invalid and may call one themselves.⁴

1 8 Vict. ch. 16, § 63.

2 2 Vict. ch. 16, § 70.

3 8 Vict. ch. 16, § 69.

4 *Brown & Theobald's Railway Law*, 92, citing *Isle of Wight Ry Co. v. Taboridin*, 25 Ch. Div. 320.

§ 438. Notice of meetings—When requisite. Frequently the time and place of the regular meetings of the stockholders are prescribed by the charter of the company or in its by-laws, or have become fixed by custom. When this is the case, it is not necessary that they be notified of the meetings,¹ unless the provision naming the day fail to

specify the hour, and the place be insufficiently designated.¹ The fact that a by-law names the third Monday in April of each year, while it may diminish, does not remove the uncertainty as to the time at which the meeting is to be held. In such a case notice of the meeting must be given, and it is highly important that it should be so definite as to leave no room for controversy.² It may well be doubted, however, whether a custom by which the shareholders' meetings are held at the same place at regular intervals, will render it unnecessary to give notice of the time and place of the meetings.³

1 *State v. Bounell*, 35 Ohio St. 10; *Warner v. Mower*, 11 Va. 385, 32 C/ *Atlantic Mutual Fire Ins. Co. v. Sanders*, 35 N. H. 732; *Bassett v. Bowdoinham Steam Mill Co.* 35 Me. 75; *Moore v. Hammond*, 6 Barn. & C. 456; *People v. Batchelor*, 22 N. Y. 124.

2 *San Buenaventura etc. Co. v. Vassault*, 50 Cal. 534. C/ *United States v. McKelider*, 8 Fed. Rep. 774.

3 *San Buenaventura etc. Co. v. Vassault*, 50 Cal. 534.

4 *Wiggin v. Freewill Baptist Church*, 6 Met. 301. Acc. both as to custom and by-law, *King v. Atwood*, 4 Barn. & Adol. 481; *King v. Westwood*, 12 Bing. 1; *King v. Bird*, 13 East; *Green v. Mayor of Durham*, 1 Burr. 127.

§ 439. The notice to be issued by an authorized officer.—The notice of a stockholders' meeting should show that it has been issued by an officer vested with authority to issue the call.¹ It is not indispensable to the validity of the meeting, however, that it be called by the persons named in the charter,² or the by-laws of the company;³ such provisions being directory rather than mandatory.⁴ But under the West Virginia code,⁵ declaring that "a general meeting of the stockholders may be called at any time by the board of directors, or by any number of stockholders, holding together at least one-tenth of the capital," a meeting called merely by the secretary, though under authority of stock-



holders holding one-tenth of the capital, was pronounced illegal, and the actions thereof of no effect.⁶ In a proper case, officers whose duty it is to call a corporate meeting, may be compelled to do so by *mandamus*.⁷

1 *Johnston v. Jones*, 29 N. J. Eq. 218; *Stevens v. Eden Meeting House Society*, 12 Vt. 688. See also *Evans v. Osgood*, 18 Me. 213; *Congregational Society of Bethany v. Sperry*, 10 Conn. 200; *State of Nevada v. Pettinell*, 10 Nev. 141, *Angell & Ames on Corporations*, § 491. As to the proper officer to issue the call, usually the general agent of the company, see *Stedins v. Merritt*, 10 Cush. 27.

2 *Judah v. American Live Stock Ins. Co.* 4 Ind. 333; *Chamberlain v. Painesville etc. R. R. Co.* 15 Ohio St. 235; *Newcomb v. Reed*, 12 Allen, 362. It may be called by a minority of shareholders, although it be the duty of the majority, where the latter refuse to do so. *Busey v. Hooper*, 35 Md. 15.

3 *Chamberlain v. Painesville etc. R. R. Co.* 15 Ohio St. 235. *Acc. Citizens' Mutual Fire Ins. Co. v. Scottwell*, 8 Allen, 217. But see *State v. Pettinell*, 10 Nev. 141.

4 *Chamberlain v. Painesville etc. R. R. Co.* 15 Ohio St. 235.

5 *West Virginia Code*, ch. 53, § 41.

6 *Reilly v. Oglebay*, 25 W. Va. 36.

7 *People v. Albany Hospital*, 61 Barb. 397; *McNeely v. Woodruff*, 13 N. J. 352; *State of Nevada v. Wright*, 10 Nev. 167. *Cf. Regina v. Aldham etc. Ins. Society*, 8 Eng. L. & Eq. 365.

§ 440. When the notice should specify the object of the meeting.—The notice should specify the place, the day and the hour of meeting, and every notice of an extraordinary meeting, or of an ordinary meeting at which unusual business is to be transacted, should specify the purpose for which the meeting is called.¹ Thus, special notice of intention to vote remuneration to directors should be given.² But when no unusual business is to be transacted at a meeting of stockholders it is not necessary that the object of the meeting be stated in the call.³ The proceedings of the meeting must be confined to the ordinary business and to such special matters as are set forth in the notice as the object of the meeting.⁴ Thus corporate officers cannot be elected

at a meeting called to amend the by-laws of the company.⁵ But notice of intention "to remove any of the present directors" would, it seems, justify resolutions removing all of them.⁶ If other business be transacted, the proceedings are so far invalid;⁷ unless all the members be present and give their consent.⁸

1 See the Companies' Clauses Act of 1845, 8 Vict. ch. 16, § 71; *Shelby R. Co. v. Louisville etc. R. R. Co.* 12 Bush, 62; *Atlantic De Laine Co. v. Mason*, 5 R. I. 463; *Tuttle v. Michigan etc. R. R. Co.* 35 Mich. 247; *Merritt v. Farris*, 22 Ill. 303; *In re Silkstone Fall Colliery Co.* 1 Ch. Div. 38; *In re Bridport Old Brewery Co.* Law R. 2 Ch. 191; *King v. Hill*, 4 Barn. & C. 426. *Of. Wills v. Murray*, 4 Ex. 843; *Zabriakie v. Cleveland etc. R. R. Co.* 23 How. 381; *Savings Bank v. Davis*, 8 Conn. 192; *Asbury R'y etc. Co. v. Riche*, Law R. 7 H. L. 653.

2 *Hutton v. West Cork R'y Co.* 23 Ch. Div. 654.

3 *Sampson v. Bowdoinham Steam Mill Co.* 36 Me. 78; *Warner v. Mower*, 11 Vt. 385; *People's Ins. Co. v. Westcott*, 14 Gray, 440. See, also, *Wills v. Murray*, 4 Ex. 843; *S. C. People v. Batchelor*, 22 N. Y. 128; *South School District v. Blakelee*, 13 Conn. 227; *Merritt v. Farris*, 22 Ill. 303; 19 Law J. Ex. 209.

4 *Atlantic De Laine Co. v. Mason*, 5 R. I. 463. See also *Smith v. Erb*, 4 Gill (Md.), 437; 8 Vict. ch. 16, § 67; *People v. Albany etc. R. R. Co.* 55 Barb. 344; *MacDougall v. Gardiner*, 1 Ch. Div. 13; *Warner v. Mower*, 11 Vt. 385; *Cook on Stock & Stockh.* § 595. *Cf. Ex parte Fox*, Law R. 6 Ch. 176.

5 *People's Ins. Co. v. Westcott*, 14 Gray, 440. *Cf. Rex v. Town of Liverpool*, 2 Burr. 723; *Rex v. Doncaster*, 2 Burr. 738.

6 *Ile of Wight R'y Co. v. Tahourdin*, 25 Ch. Div. 320.

7 *In re British Sugar etc. Co.* 3 Kay & J. 408, 413; *Graham v. Van Die-man's Land Co.* 1 Hurl. & N. 541; *Cleve v. Financial Corporation*, Law R. 16 Eq. 363. *Cf. In re Irrigation Co. of France*, Law R. 6 Ch. 176.

8 *King v. Theodorick*, 8 East, 543; *In re The Joint Stock Companies Act of 1856*, 3 Kay & J. 408; *San Buenaventura etc. Co. v. Vassanet*, 50 Cal. 534. See *People's Mutual Ins. Co. v. Westcott*, 14 Gray, 440.

§ 441. **Of the service of notice.**—If the manner of serving notice be prescribed, the validity of the proceedings depend upon compliance with the requirement.¹ Notice of stockholders' meetings should be personally served, unless otherwise prescribed by statute, charter or by-law,² at a reasonable time before the date of meeting.³ If a stockholder be absent from his usual place of residence or business, notice should be left there⁴ with some member of

his family.¹ To support the validity of corporate acts, each member must be actually summoned.² Where stock has been pledged, the notice of meeting should be served upon the pledgor unless the pledgee has foreclosed.³

1 *Shelby & R. Co. v. Louisville etc. R. R. Co.* 13 Bush. Ct. *Holly v. Ogilby*, 26 W. Va. 26; *Warner v. Meyer*, 11 Va. 526; *Stevens v. Eden Meeting House Society*, 12 Va. 626; *Johnston v. Jones*, 15 N. J. Eq. 216; *Burgess Dock Co. v. Leitch*, 20 Law J. Ex. 647; *Cy. (Vittoria) Mutual etc. Co. v. Centwall*, 8 Allen, 217; *Smith v. Lee* 21 N. Y. 226.

2 *Savings Bank v. Davis*, 1 Conn. 179; *Shaw v. Wiles*, 1 Conn. 214; 18 Am. For. 66; *Wiggins v. Freewill Baptist Church*, 4 Bush. 201; *Stevens v. Eden Meeting House Society*, 12 Va. 626; *Taylor v. Oriskany*, 1 Osgood, 126; 27 Am. Dec. 23; *Tuttle v. Michigan Air Line R. R. Co.* 25 Mich. 247; *Harding v. Vanderwey*, 60 Cal. 77; *Cy. Porter v. Robinson*, 20 Run. 2nd. 216; *Shelby v. Morris*, 16 Conn. 27; *Haz v. Deane*, 2 Burr. 728; *Rees v. Town of Liverpool*, 2 Burr. 728.

3 *In re Long Island R. R. Co.* 19 Wood. 27 28 Am. Dec. 626; *Wiggins v. Freewill Baptist Church*, 4 Bush. 201; *Cy. Covert v. Rogers*, 21 Mich. 226; 4 Am. Rep. 701. As to what constitutes a reasonable time see *Shelby & R. Co. v. Louisville etc. R. R. Co.* 13 Bush. Ct. Fourteen days public notice, at least, of all meetings, whether ordinary or extraordinary is required by the English Companies' Clauses Act of 1845, to be given by advertisement; 11 Vict. ch. 11, § 71.

4 *Johnson v. Hampton*, 20 Me. 27.

5 Leaving a written or even a verbal notice with a member of the stockholder's family has been held sufficient. *Williams v. German Mutual Fire Ins. Co.* 66 Ill. 227. See, however, *Stevens v. Eden Meeting House Society*, 12 Va. 626. As to effect of death of shareholder upon the validity of a meeting held before the appointment of his administrator, see *Freeport's National Bank v. Smith*, 13 Mich. 226.

6 *Angell & Ames on Corporations* § 697; *People v. Albany etc. R. R. Co.* 66 Barb. 264; *Shelby & R. Co. v. Louisville etc. R. R. Co.* 13 Bush. Ct. *McDaniels v. Flower Brook Mfg. Co.* 22 Va. 274; *Johnson v. Hampton*, 20 Me. 27; *Wiggins v. Freewill Baptist Church*, 4 Mich. 201; *Commonwealth v. Cullen*, 12 Pa. 64 125; 63 Am. Dec. 453; *San Bernardino etc. Co. v. Younts*, 10 Cal. 626; *Rees v. Langhorn*, 4 Ad. & E. 426 n. 1; 6 How. & M. 226; 3 How. & M. 616; *Moore v. Harwood*, 4 Har. & C. 426; *Smith v. Darby*, 3 H. L. Cas. 726; *Cy. People v. Rochester*, 21 N. Y. 126, 131; *People v. Peck*, 11 Wood. 626; 27 Am. Dec. 100; *Shelby v. Morris*, 16 Conn. 27; *Watts & S. 46*; *Stebbins v. Morris*, 1 Conn. 27; *Cannon v. Trask*, Law R. 20 Eq. 626; *MacDougall v. Gardiner*, 1 Ch. Div. 13.

7 *New York etc. R. R. Co. v. Schuyler*, 26 Barb. 534, 542; *McDaniels v. Flower Brook Mfg. Co.* 22 Va. 274.

§ 442. Waiver of notice.—The stockholder's right to notice may be waived¹ by attending the meeting.² A stockholder who has not suffered by an omission to serve notice "cannot avail himself

of a neglect to give notice to any other stockholder."³ If a meeting be not properly called, the waiver of all the stockholders is requisite to give validity to its proceedings,⁴ the absence or dissent of a single shareholder being fatal.⁵

1 *Richardson v. Vermont etc. R. R. Co.* 44 Vt. 613; *Jones v. Milton etc. Turnpike Co.* 7 Ind. 547; *Judah v. American etc. Ins. Co.* 4 Ind. 333; *Phosphate of Lime Co. v. Green*, Law R. 7 Com. P. 43; *Turquand v. Marshall*, Law R. 4 Ch. 376; *Smallcombe v. Evans*, Law R. 3 H. L. 249; *Bryant v. Goodnow*, 5 Pick. 228; *Kenton Furnace R. R. & Manuf. Co. v. McAlpin*, 5 Fed. Rep. 737. But see *United States v. McKelden*, 8 Am. Rep. 778; *In re Long Island R. R. Co.* 19 Wend. 37; 32 Am. Dec. 429. See *People v. Peck*, 11 Wend. 604; 27 Am. Dec. 104; *King v. Theodorick*, 8 East, 543. One of the officers issuing the notice cannot take advantage of irregularities therein: *Schenectady etc. Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Bucksport etc. R. R. Co. v. Buck*, 68 Me. 81.

2 *Kenton Furnace R. R. & Manufacturing Co. v. McAlpin*, 5 Fed. Rep. 737; *People v. Peck*, 11 Wend. 604; 27 Am. Dec. 104; *Stebbins v. Merritt*, 10 Cush. 27; *Ex parte Faria*, Law J. Ch. 369; *King v. Chetwynd*, 7 Barn. & C. 695; *Jones v. Milton etc. Turnpike Co.* 7 Ind. 547; *In re The Joint Stock Companies Act, 1856*, 3 Kay & J. 408; *William v. Financial Corporation*, Law R. 16 Eq. 363, 375. Cf. *San Buenaventura etc. Co. v. Vassault*, 50 Cal. 534; *In re British Sugar Refining Co.* 3 Kay & J. 408. See *State of Nevada v. Pettinelli*, 10 Nev. 141.

3 *Schenectady etc. Plank Road Co. v. Thatcher*, 11 N. Y. 102. See *In re Mohawk etc. R. R. Co.* 19 Wend. 135. Cf. *Samuel v. Holliday*, 1 Woolw. 400.

4 *State of Nevada v. Pettinelli*, 10 Nev. 141.

5 *Farwell v. Houghton etc. Works*, 8 Fed. Rep. 66; *Moore v. Hammond*, 6 Barn. & C. 456; *Rex v. Langhorn*, 4 Ad. & E. 538; 8 C. 2 Nev. & M. 618; 6 Nev. & M. 203; *Smyth v. Darley*, 2 H. L. Cas. 789; *Rex v. Theodorick*, 8 East, 543; *Rex v. Gaboriau*, 11 East, 36, note, 87, note. Cf. *People's Ins. Co. v. Westcott*, 14 Gray, 440; *Dillon on Municipal Corporations*, § 202; *Angell & Ames on Corporations*, § 495.

§ 443. **Of the right to vote at shareholders' meetings.**—The members of a corporation having a capital stock divided into shares, do not vote as individuals, but as the holders of those shares; accordingly, the number of votes to which each is entitled is determined by the number of shares which he holds.¹ In England, the act of incorporation often provides a scale regulating the number of votes which the shareholders shall have, and when no such scale is prescribed, every shareholder has

one vote for every share up to ten, and an additional vote for every five shares beyond the first ten shares held by him up to one hundred, and an additional vote for every ten shares held by him beyond the first hundred shares; provided always, that no shareholder shall be entitled to vote at any meeting unless he shall have paid all the calls then due upon the shares held by him.² The right of a shareholder to vote cannot be taken away or restricted by any by-law of the corporation.³ It is said, however, that a statute confining the right of voting to citizens of the incorporating State is constitutional.⁴ It may well be doubted, however, whether a statute thus discriminating against the citizens of another State would be held by the federal courts to be in harmony with the constitutional declaration that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."⁵ A municipal corporation holding stock in a railway company may vote upon it in the same manner as any other shareholder.⁶ A stockholder is entitled to vote upon stock issued by way of dividend as well as upon his original shares.⁷

1 *Hays v. Commonwealth*, 82 Pa. St. 518. *Contra*, *Taylor v. Griswold*, 3 Green, 122; 27 Am. Dec. 33.

2 8 Vict. ch. 16, § 75.

3 *People v. Kip*, 4 Conn. 382, note; *Browster v. Hartley*, 37 Cal. 15, 24; 99 Am. Dec. 237; *Rex v. Spencer*, 3 Burr. 1827; *Cook on Stock & Stockh.* § 638.

4 *State v. Hunton*, 23 Vt. 594.

5 U. S. Const. art. iv, § 2.

6 *Kreiger v. Shelby R. R. Co.* (Ky. 1886), 26 Am. & Eng. R. R. Cas. 123; *Cook on Stock & Stockh.* § 608.

7 *Bailey v. Railroad Co.* 23 Wall. 604, 637. As to whether scrip certificates issued by way of dividend can be voted, see *Bailey v. Railroad Co.*, 23 Wall. 634, 635.

Railroad & Manuf. Co. v. McAlpin, 5 Fed. Rep. 737; *Hardy v. Norfolk Manuf. Co.* 80 Va. 404; *Allen v. Hill*, 18 Cal. 113.

§ 445. **Who entitled to vote—New York and English statutes.**—In New York, however, it is by statute made unlawful for a stockholder in a railway company to vote upon any stock where the certificates thereof are not in his possession or under his control, and where he has ceased to retain title to the stock as owner either in his own right, or in some fiduciary capacity, notwithstanding that the stock may still stand in his name on the books of the company;¹ and the inspector of elections may require a shareholder offering to vote to take an oath that he has not sold or otherwise disposed of his shares, and that they still remain in his possession and subject to his control.² Under the New York General Railroad Act of 1850, a shareholder is entitled to vote only upon shares which have been "held by him thirty days previous to such election."³ In England, if several persons be jointly entitled to a share, the person whose name stands first in the register of shareholders as one of the holders of such share, shall, for the purpose of voting at any meeting be deemed the sole proprietor thereof; and on all occasions the vote of such first-named shareholder, either in person or by proxy, shall be allowed as the vote in respect of such share, without proof of the concurrence of the other holders thereof.⁴

¹ N. Y. Laws of 1880, ch. 510, § 2.

² N. Y. Laws of 1880, ch. 510, § 2.

³ N. Y. Laws of 1850, ch. 140, § 5. Cf. *In re St. Lawrence Steamboat Co.* 41 N. J. 523; *Downing v. Potts*, 23 N. J. 66; *Hopkin v. Buffam*, 9 B. L. 513; 11 Am. Rep. 291.

⁴ 8 Vict. ch. 16, § 78.

§ 446. **Stock held by the corporation not to be voted upon.**—When shares of stock have been

transferred to the corporation, "the right of voting upon them is suspended" until they are sold and retransferred by its authority.¹ And the rule is the same whether they be transferred directly to the company or to a trustee, to hold for its benefit.² In neither case can they be voted upon, either by the officers of the company or by the trustee,³ without the consent of all the holders of the balance of the stock.⁴ It is not to be tolerated that a company should procure stock in any shape which its officers may wield to the purpose of an election, thus securing themselves against the possibility of removal.⁵ Accordingly, an election of officers in this manner is illegal,⁶ and they may be removed by *mandamus*,⁷ and the candidates receiving the highest number of votes exclusive of those illegally cast may be declared elected.⁸

1 American Railway Frog Co. v. Haven, 101 Mass. 398; 3 Am. Rep. 377.

2 American Railway Frog Co. v. Haven, 101 Mass. 398; 3 Am. Rep. 377.

3 United States v. Columbian Ins. Co. 2 Cranch C. C. 266; Va'l v. Hamilton, 85 N. Y. 453; Ex parte Holmes, 5 Conn. 42; Mosseaux v. Urquhart, 19 La. An. 492; American Railway Frog Co. v. Haven, 101 Mass. 398; 3 Am. Rep. 377; State v. Smith, 48 Vt. 266; New England Mutual etc. Ins. Co. v. Phillips (Mass. 1886), 13 Am. & Eng. Corp. Cas. 104; McNeely v. Woodruff, 13 N. J. 352. Cf. Taylor v. Miami Exporting Co. 6 Ohio, 176; S. C. 5 Ohio, 162; 23 Am. Dec. 785; Frazer v. Whatley, 2 Hem. & M. 10.

4 Farwell v. Houghton etc. Works, 8 Fed. Rep. 66. Cf. Stevens on Canadian Joint Stock Companies, § 354.

5 Ex parte Holmes, 5 Cow. 426.

6 Ex parte Desdoity, 1 Wend. 98.

7 American Railway Frog Co. v. Haven, 101 Mass. 398; 3 Am. Rep. 377.

8 Ex parte Desdoity, 1 Wend. 98; Mosseaux v. Urquhart, 19 La. An. 492; McNeely v. Woodruff, 13 N. J. 352; Cook on Stock & Stockh. § 613.

§ 447. **Of proxies.**—The right to vote by proxy at corporate meetings is frequently conferred upon shareholders by statute,¹ or by charter,² or even by a by-law of the corporation;³ it does not exist, however, at common law.⁴ But an injunction will not

be granted in one State to prevent corporate officers from voting, upon proxies of the shareholders, at a meeting to be held in another State, on the ground that voting by proxy is illegal except where there is a statute expressly allowing it, and that there is no such statute in the latter State, the presumption being in favor of legal proceedings on the part of the officers of the corporation, and there being a remedy in case they disobey the law.⁶ In England it is enacted that the votes may be given either personally or by proxies, authorized by writing according to a form in a schedule annexed to the act, or in a form to the like effect, under the hand of the shareholder nominating the proxy, or if the shareholder be a corporation, then under its common seal.⁶ No person shall be entitled to vote as a proxy unless the instrument appointing him has been transmitted to the secretary of the company for a period prescribed by the charter, or if no period be prescribed, then for not less than forty-eight hours before the time appointed for holding the meeting at which the proxy is to be used.⁷ If any shareholder be a lunatic or idiot, he may vote by his committee; and if any shareholder be a minor, he may vote by his guardian or any one of his guardians; and every such vote may be given either in person or by proxy.⁸ In New York any person offering to vote as agent, attorney or proxy for another, shall, if required by the inspector of election, take and subscribe an oath to the effect that he believes that the stock upon which he offers to vote, is truly and in good faith vested in and subject to the control of the person in whose name it stands.⁹

quired proportion of capital, unless such number would be more than twenty, in which case twenty shareholders, holding not less than one-twentieth of the capital of the company, shall be the quorum, and if within one hour from the time appointed for such meeting the said quorum be not present, no business shall be transacted at the meeting, other than the declaring of a dividend, in case that shall be one of the objects of the meeting, but such meetings shall, except in the case of a meeting for the election of directors, hereinafter mentioned, be held to be adjourned *sine die*.² In America, the holders of a majority of the stock of the corporation usually constitute a quorum for the transaction of business, and a majority of that quorum may bind the corporation by their acts and resolutions.³ But no one shareholder, however large an amount of stock he may own, can constitute a quorum of a stockholders' meeting; at least two shareholders are necessary to constitute a quorum.⁴ Where one stockholder owns a majority of the stock of a corporation he cannot act as the corporation;⁵ nor can he act as the corporation although he may own all of the stock but two shares;⁶ and the same rule has been said to apply where all of the stock is vested in one holder.⁷ In considering the question, what constitutes a majority, a distinction is drawn between the case in which a corporate act is to be done by a definite number of persons, and the case in which it is to be performed by an indefinite number. In the former, a majority is necessary to constitute a quorum, and no act can be done unless a majority be present; in the latter case a majority of those who attend may act, however small the number may

be.* Likewise, it follows that a majority of the votes actually cast will be sufficient, although it may not be a majority of those who are present.*

1 *Citizens' Mutual etc. Ins. Co. v. Sortwell*, 3 Allen, 217; and cases cited *infra*.

2 8 Vict. ch. 16, § 72.

3 *Brown v. Pacific Mail etc. Co.* 5 Hatchf. 525; *People v. Walker*, 2 Abb. Tr. 421, 8 C. 23 Barb. 308; *Field v. Field*, 9 Wend. 394; *Ex parte Willcocks*, 7 Cow. 402; 17 Am. Dec. 525; *Madison Ave. etc. Church v. Baptist Church*, 5 Rob. (N. Y.) 541; *Dudley v. Kentucky Hig's School*, 9 Bush, 570; *New Orleans etc. R. R. Co. v. Harris*, 27 Miss. 517, 537; *Durfee v. Old Colony etc. R. R. Co.* 5 Allen, 230, 242; *Sergeant v. Webster*, 13 Met. 407, 43 Am. Dec. 743; *Gifford v. New Jersey R. R. Co.* 10 N. J. L. 171; *In re St. Mary's Church*, 7 Serg. & R. 517; *Everett v. Smith*, 22 Minor, 13. Cf. *Treadwell v. Salisbury Manuf. Co.* 7 Gray, 323; 66 Am. Dec. 420; *Stevens v. Rutland etc. R. R. Co.* 29 Vt. 545; *Stevens v. South Devon Ry. Co.* 9 Hare, 313.

4 *Sharpe v. Dawes*, 46 Law J. Q. B. 104.

5 *Hopkins v. Rosedale etc. Co.* 72 Ill. 373.

6 *England v. Dearborn*, 141 Mass. 590.

7 *Button v. Hoffman*, 51 Wis. 20; 50 Am. Rep. 131. *Contra, Swift v. Smith*, 65 Md. 428; 57 Am. Rep. 334.

8 *Craig v. First Presbyterian Church*, 68 Pa. St. 42; 32 Am. Rep. 417. *In re St. Mary's Church*, 7 Serg. & R. 517; *Columbia Bottom etc. Co. v. Meier*, 33 Mo. 53; *King v. Whitaker*, 9 Barn. & C. 648; *S. p. Gowen's Appeal*, 10 Weekly Notes Cas. 85. See *Commonwealth v. Wickersham*, 66 Pa. St. 131; *Angell & Ames on Corporations*, § 464; *Willcock on Municipal Corporations*, § 68.

9 *State v. Green*, 37 Ohio St. 237; *Gowen's Appeal*, 10 Weekly Notes Cas. 85. But see *Commonwealth v. Wickersham*, 66 Pa. St. 134, an earlier case than the Pennsylvania case cited above.

§ 450. Cumulative voting—Minority representation.—In several of the united American States there are constitutional or statutory provisions, creating what is known as "cumulative voting," conferring upon each member or shareholder the privilege of casting the whole number of his votes for one candidate, or of distributing them upon two or more candidates, as he may prefer.¹ The purpose of these provisions is to enable a minority of the shareholders to obtain a representation upon the board of directors. Cumulative voting may be best explained in the words of the

California constitution: "In all elections for directors or managers of corporations every stockholder shall have the right to vote, in person or by proxy, the number of shares of stock owned by him, for as many persons as there are directors or managers to be elected, or to cumulate said shares and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall see fit."¹ These constitutional provisions do not require an act of the legislature to render them operative.²

¹ Pa. Const. (1873) art. xvi, § 4; *Wright v. Commonwealth of Pennsylvania* (Sup. Ct. of Penn. 1885), 11 Am. & Eng. Corp. Cas. 609; W. Va. Const. (1872) art. xi, § 4; Neb. Const. (1875) art. xi, Miscellaneous Provisions, § 5; Mo. Const. (1875) art. xii, § 6; Ill. Const. (1870) art. xi, § 3; *People v. Kenny*, 96 N. Y. 294; *People v. Crissey*, 91 N. Y. 616; *State v. Greer*, 78 Mo. 188; *Hays v. Commonwealth*, 83 Pa. St. 518, 522; *State v. Constantine*, 42 Ohio St. 437; 51 Am. Rep. 833. Ohio Rev. Stat. § 3245, enacting that "each share shall entitle the holder to as many votes as there are directors to be elected," has been held not to create the power of cumulative voting: *State v. Stockley* (1887), 45 Ohio, 304.

² Cal. Const. (1879) art. xii, § 12; *Wright v. Central California etc. Water Co.* 67 Cal. 532.

³ *Pierce v. Commonwealth*, 104 Pa. St. 150.

§ 451. **Combinations among shareholders to control the corporation.**—Combinations among stockholders for the purpose of electing certain persons as officers are not necessarily illegal,¹ unless entered into for a fraudulent purpose.² Ordinarily a court of equity will not interfere by injunction, to restrain a portion of the stockholders from voting upon their shares, upon the ground that they are about to gain control of the company to the injury of the corporate enterprise,³ unless an illegal combination in the nature of a conspiracy to defraud the plaintiffs can be shown.⁴ A combi-

nation of shareholders for the purpose of controlling a railway corporation may lawfully transfer their stock to trustees, empowering them to vote upon the shares, and receiving from them transferable trust certificates. When this is done, the entire beneficial interest in the stock is severally vested in the certificate holders, the voting power in the trustees, and the situation does not differ materially from what it would be if the stockholders retaining their shares had simply united in a proxy authorizing the trustees to cast the votes of all of them for directors.⁶ In the case last cited it was said: "We can perceive no reason why any number of shareholders, either by means of a proxy or by vesting the legal title in another, may not authorize him to vote upon their stock, and as such is the substance of this agreement, we consider it not illegal. So long as the parties to it, or their successors in interest, are satisfied with it, no other person may complain."⁶ But any stockholder may withdraw from such a contract, although it be expressly agreed that it shall be irrevocable.⁷ In a recent case, where steps had been taken by the officers of a corporation to obtain from the shareholders a deposit of their stock, together with powers of attorney, with themselves or their agents, in order that they might vote on them at a meeting of the shareholders, an injunction to restrain them from so doing, on the ground that a trust was created by the transaction in behalf of the company, was refused, as it did not appear that corporate funds had been employed.⁸

1. *Havemeyer v. Havemeyer*, 26 N. Y. 513; S. C. 43 N. Y. Super. Ct. 504, 513; *Barnes v. Brown*, 30 N. Y. 527, 537; *Faulds v. Yates*, 37 Ill. 416; 21 Am. Rep. 26.

2 *People v. Albany etc. R. R. Co.* 55 Barb. 344. See *Fisher v. Bush* 35 Hun, 641; *Vanderbilt v. Bennett*, 2 R'y & Corp. Law J. 4.9, 535. See also, Mr. Austin Abbott's learned annotation of this and other similar cases, in 19 Abb. N. C. 437 *et seq.*

3 *Camden etc. R. R. Co. v. Elkins*, 37 N. J. Eq. 273. *Cf. Hills v. Parrish*, 14 N. J. Eq. 330; *Ryder v. Alton etc. R. R. Co.* 13 Ill. 516.

4 *Brown v. Pacific Mail Steamship Co.* 5 Blatchf. 525; *People v. Albany etc. R. R. Co.* 55 Barb. 344; *Webb v. Ridgely*, 33 Md. 364; *Hale v. New York etc. R. R. Co. (Ohio)* 14 Week. Law Bul. 63; *Hoppin v. Buffum*, 9 R. I. 513; 11 Am. Rep. 291; *Griffith v. Jewett (Ohio)*, 15 Week. Law Bul. 419. *Cf. Reed v. Jones*, 6 Wis. 630.

5 *Griffith v. Jewett (Cin. Super. Ct. 1886)*, 15 Week. Law Bul. 419.

6 *Griffith v. Jewett (Cin. Super. Ct. May, 1886)*, 15 Week. Law Bul. 419. But see *Fisher v. Bush*, 35 Hun, 641.

7 *Griffith v. Jewett (Cin. Super. Ct. 1886)*, 15 Week. Law Bul. 419. See upon this subject, Cook on Stock & Stockh. § 618.

8 *Woodruff v. Dubuque etc. R. R. Co.* 30 Fed. Rep. 91; S. C. 19 Abb. N. C. 437, and the note.

§ 452. **Bribery.**—In New York it is enacted that no person having the right to vote on stock or bonds shall sell his vote or issue a proxy for any sum of money or anything of value whatever, and if required by the inspector of election, he shall take an oath that in voting at the election he has not either directly or impliedly received any promise, or any sum of money, or anything of value, to influence his vote.¹ Any person offering to vote as an agent, attorney or proxy may be required to swear that he has not induced the giving of the authority by bribery.²

1 N. Y. Laws of 1880, ch. 510, § 2.

2 N. Y. Laws of 1880, ch. 510, § 2.

§ 453. **Of irregularities and illegal proceedings.**—The proceedings of a shareholders' meeting, by which the wishes of the members of the company have been fairly expressed, will not be set aside as illegal merely upon the ground of some irregularity of procedure.¹ But an illegal or fraud-

ulent election may be set aside;¹ and persons assuming to act as officers of a corporation under color of an illegal election may be ousted by proceedings in the nature of *quo warranto*.² But an "election is not to be set aside and declared void merely because votes were received from persons not entitled to vote, if there was still a majority of legal votes for the ticket declared to be elected."³ After the illegal votes have been counted out, the candidate receiving the majority of those legally cast will be declared elected, although that majority be less than half of the total number of votes, legal and illegal.⁴

1. *People v. Albany etc. R. R. Co.* 33 Barb. 304; *In re Wheeler*, 2 Abb. Pr. N. B. 34; *People v. Peck*, 11 Wend. 609, 37 Am. Dec. 101; *People v. Witham*, 1 Paige 300; *Hughes v. Parker* 20 N. H. 30; *Dwelling v. Potts*, 23 N. J. 61; *Hardenburgh v. Farmers' etc. Bank*, 2 N. J. Eq. 65; *Guthrie v. Campbell*, 2 Cal. 124.

2. *Davidson v. Grange*, 4 Grant's Ch. (N. C.) 37; *Wandsworth etc. Gas Light & Coke Co. v. Wright*, 10 Week. R. 720, 31 Lawrence (Lancaster) 40; 44 N. J. 330; *Mechanics National Bank v. Barnett Manufacturing Co.* 21 N. J. Eq. 125; *Johnson v. Jones* 23 N. J. Eq. 316; *Putnam v. Jones*, 1 Chandler Wm. 700 N. Y. 1; *How State ch. writ* 14 N. B. 60 (page 309); *N. Y. 1*; *How State ch. writ*, 40 N. B. 346; 10 (page 309); *The Schuylkill Valley R. R. Co.* 12 Abb. Pr. N. B. 304; *Cal. Bank* 116; 6, 6 13; *How State ch. writ* 15 N. B. 10; *Am. Dec. 137*; *Wright v. Central California etc. Water Co.* 47 Cal. 124. But see *Wickes v. Rochester City Bank*, 1 Paige 119; 40 Am. Dec. 123; *New England etc. Co. v. Phillips* (Mass. 1886), 13 Am. & Eng. Corp. Cas. 101; *Mechanics National Bank v. Barnett Manufacturing Co.* 21 N. J. Eq. 125; *Johnson v. Jones* 23 N. J. Eq. 316; *Grove v. Wheeler* 21 N. J. 74; 121. *Wandsworth etc. Gas Light & Coke Co. v. Wright* 10 Week. R. 720; *Bamby v. Wells Flouring Mills Co.* 1 Post Rep. 279; 8 C. 1; *McCrory* 61.

3. *People v. Albany etc. R. R. Co.* 33 Barb. 304, 335. *Cf. Rogers v. W. Union*, 1 Conn. 410; 17 Am. Dec. 333; *Dwelling v. Potts*, 10 Paige, 301; *People v. Ashburn*, 6 How. Pr. 213; *Weeks v. Kline*, 3 Barb. 126; *Mechanics National Bank v. Barnett Manufacturing Co.* 21 N. J. Eq. 124.

4. *People v. Totten*, 21 N. Y. 31; *In re Channing etc. Iron Co.* 19 Week. R. 74; *Farmer's Murph.* 7 Conn. 123; *State v. Latta*, 7 Rich. 123, 200; *State v. Dyer*, 1 Conn. 31; *and* 19 First Parish to Sudbury v. Benson, 21 Post. 10; *Christ Church v. Pope*, 3 Gray 163; *McHenry v. Woodruff*, 13 N. J. 14; *People v. Davis*, 17 Cal. 34.

5. *Ex parte Duple*, 1 Wend. 6; *Montgomery v. Trenchard*, 10 La. An. 68; *People v. Livingston*, 12 Cal. 12; *In re etc. etc. Lawrence Steamboat Co.* 41 N. J. 330. *Cf. In re Long Island R. R. Co.* 19 Week. R. 30 Am. Dec. 11; *Dwelling v. Potts*, 23 N. J. 61. Contra, holding that a new election will be held to give a new one, see *People v. Phillips*, 1 Davis, 100; *In re Long Island R. R. Co.* 19 Week. R. 31 Am. Dec. 43; *State v. McHenry*, 10 Ohio 61, 204.

§ 454. **Waiver of irregularities and illegality.** Irregularities in the proceedings of stockholders' meetings may be waived by a failure to enter a prompt protest against them.¹ Neither a shareholder himself, nor the transferee of a shareholder,² who participated in the proceedings of a corporate meeting alleged to be illegal or fraudulent,³ or who was guilty of negligence,⁴ as, for example, by failing to challenge illegal votes,⁵ or who has acquiesced in the result,⁶ has any equitable right to have the proceedings set aside.⁷

1 *State v. Lehre*, 7 Rich. 234, 325; *Prettyman v. Tazewell Co.* 19 Ill. 406; 71 Am. Dec. 230; *King v. Trevenen*, 2 Barn. & Ald. 339; *Mosgrave v. Nevinson*, 2 Raym. Ld. 1358.

2 *In re Syracuse etc. R. R. Co.* 91 N. Y. 1.

3 *Wiltz v. Peters*, 4 La. An. 339.

4 *Wiltz v. Peters*, 4 La. An. 339.

5 *In re Chenango etc. Ins. Co.* 19 Wend. 635. *Cf. The Schoharie Valley R. R. Case*, 12 Abb. Pr. N. S. 394.

6 *Wiltz v. Peters*, 4 La. An. 339.

7 *Cook on Stock & Stockh.* § 616.

§ 455. **The presumption omnia rite acta, applicable to corporate meetings.**—The presumption is in favor of the regularity of corporate meetings.¹ Accordingly, if the minutes be silent as to the mode in which officers were elected, it will be presumed that they were chosen in the manner required by law, until evidence to the contrary be produced.² In England, by the Companies' Clauses Act of 1845, it is provided, that whenever in that act, or in the special act of incorporation, the consent of any particular majority of votes at any meeting of the company is required in order to authorize any proceeding of the company, that particular majority shall only be required to be proved in the event of a poll being demanded at the meet-

ing; and if a poll be not demanded, then a declaration by the chairman that the resolution authorizing the proceeding has been carried, and an entry to that effect in the book of proceedings of the company, shall be sufficient authority for such proceeding, without proof of the number or proportion of votes recorded in favor of or against the same.³ But, independently of statutory enactment, the minutes of corporate meetings are received as *prima facie* evidence of the statements therein contained.⁴ Thus, when the books of a corporation, or of its board of directors, in the minutes of a meeting state that a certain proposition was passed, it is *prima facie* evidence that it passed regularly, having the requisite vote, a majority, or two-thirds, as the case may be.⁵ For the minutes of corporate meetings are seldom kept with nice accuracy of detail. Results reached are usually about all that is stated. Accordingly, "the presumption in favor of the regularity of proceedings of meetings of corporations and boards of directors is almost a matter of necessity."⁶ If the minutes of a corporation state that certain business was transacted at a special meeting duly called, and that proper notice was given, it will be presumed that a quorum was present.⁷ Where the record showed that a quorum was present at a corporate meeting, it will be presumed that all the members were notified.⁸ "The presumption *omnia rite acta* covers a multitude of defects in such cases, and throws the burden on those who would deny the regularity of a meeting, for want of due notice, to establish it by proof."⁹

¹ *Blanchard v. Dow*, 32 Me. 557; *Ashtabula etc. R. R. Co. v. Gardiner*, 1 Ch. Div. 13, and cases cited *infra*.

2 *Beardsley v. Johnson* (1888), 40 Hun, 697; *Hathaway v. Addison*, 6 Mo. 440.

3 8 Vict. ch. 16, § 80.

4 *Heintzelman v. Druids' Relief Assoc.* 38 Minn. 138; 4 R'y & Corp. Law J. 336; *McDaniels v. Flower Brook Manuf. Co.* 22 Vt. 274; *Sanborn v. School District*, 13 Minn. 17; *Isbell v. Railroad Co.* 25 Conn. 554.

5 *Heintzelman v. Druids' Relief Assoc.* 38 Minn. 138; 4 R'y & Corp. Law J. 336; *McDaniels v. Flower Brook Manuf. Co.* 22 Vt. 274.

6 *Heintzelman v. Druids' Relief Assoc.* 38 Minn. 138; 4 R'y & Corp. Law J. 336.

7 *Insurance Co. v. Sortewall*, 8 Allen, 223; *Balle v. Educational Soc.* 6 Md. 117.

8 *Lane v. Brainerd*, 30 Conn. 585; *Insurance Co. v. Holmes*, 68 Mo. 601; *Sargent v. Webster*, 13 Met. 497; 46 Am. Dec. 743.

9 *Sargent v. Webster*, 13 Met. 497; 46 Am. Dec. 743. *Acc. Porter v. Robinson*, 31 Hun, 209; *Medical and Surgical Society v. Weatherly*, 73 Ala. 248; *Sargent v. Webster*, 13 Met. 497; 46 Am. Dec. 743; *McDaniels v. Flower Brook Manuf. Co.* 22 Vt. 274. *Cf. Lane v. Brainerd*, 30 Conn. 585; *Pain v. Temple*, 2 Mass. 538; *Copp v. Lamb*, 12 Me. 312.

CHAPTER XIX.

DIRECTORS, OFFICERS AND AGENTS.

- § 456. Of the number of directors.
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- § 494. Of contribution between directors jointly liable.
- § 495. Liability of directors under the New York Penal Code.
- § 496. Liability of directors, officers and agents under the New York Penal Code.
- § 497. Directors and officers prohibited from gambling in the securities of the company.
- § 498. Of *de facto* directors, officers and agents.

§ 456. Of the number of directors.—The board of directors of every corporation formed under the General Railroad Act of New York consists of thirteen members.¹ But the board of directors of a road not exceeding twenty miles in length may consist of seven of its stockholders.² In England, where the company shall be authorized by the special act of incorporation to increase or to reduce the number of the directors, it shall be lawful for the company, from time to time, in general meeting, after due notice for that purpose, to increase or reduce the number of directors within the prescribed limits, if any, and to determine the order of rotation in which such reduced or increased number shall go

out of office, and what number shall be a quorum at their meetings.¹

¹ N. Y. Laws of 1850, ch. 140, § 2.

² N. Y. Laws of 1864, ch. 522, § 2, as amended by laws of 1865, ch. 42.

³ 8 Vt. ch. 16, § 52.

§ 457. **Qualifications of directors at common law.**—The qualifications of directors may be prescribed by a by-law passed by the shareholders of the company;¹ but the directors themselves have no such authority.² Any one competent to act as an agent, as for example, a married woman,³ may be elected as a director of a company; and at common law it is not necessary that a director be a stockholder of the corporation.⁴ Unless there be some constitutional,⁵ statutory, or charter provision, or some by-law requiring the directors, or a majority of them, to be citizens and residents of the incorporating State, there is no principle of common law imposing such a qualification.⁶

¹ *People v. Northern R. R. Co.* 63 N. Y. 217; *Cammer v. United Church*, 28 Ind. Ch. 184.

² *In re British Provident Life etc. Assn.* 6 Ch. Div. 306. *Cf. Lord Claud Hamilton's Case*, Law R. 8 Ch. 548.

³ *People v. Webster*, 10 Wend. 554.

⁴ *Wight v. Springfield etc. R. R. Co.* 117 Mass. 226; 19 Am. Rep. 412; *In re etc. St. Lawrence Steamboat Co.* 41 N. J. 599; *State v. McDaniel*, 22 Ohio St. 354, 367; *Ex parte Stock*, 33 Law J. Ch. 731; *Cock on Stock & Stockh.* § 629. *Cf. Despatch Line v. Bellamy Manuf. Co.* 12 N. H. 208; 37 Am. Dec. 243; *Bartholomew v. Bentley*, 1 Ohio St. 37; *Taylor on Corporations* § 614, note.

⁵ As in Illinois. See Ill. Const. (1870) art. XI, § 11.

⁶ *Kerchner v. Gettys*, 18 S. C. 521.

§ 458. **Statutory qualifications of directors.** In New York it is provided by the General Railroad Act of 1850, that no person shall be a director unless he shall be a stockholder, owning stock absolutely in his own right and qualified to vote for

directors at the election at which he shall be chosen.¹ Similar statutes are to be found in other American States.² In England it is enacted by the Companies' Clauses Act of 1845 that no person shall be capable of being a director unless he be a shareholder, nor unless he be possessed of the number of shares prescribed by the act of incorporation, if any; and no person holding an office or place of trust or profit under the company, or interested in any contract with the company, shall be capable of being a director; and no director shall be capable of accepting any other office or place of trust or profit under the company, or of being interested in any contract with the company, during the time he shall be a director.³ It has been held in Connecticut that a director of a corporation which holds stock in another corporation is a stockholder in the latter within the meaning of a statute requiring the directors of corporations to be stockholders therein.⁴ Even a person who is entitled to vote at corporate meetings merely as the holder of a power of attorney, is competent to act as a director.⁵ It is no objection to the competency of a director that stock was transferred to him in trust for the purpose of qualifying him to act.⁶ Under a statutory provision that the directors of a corporation shall be elected from the shareholders, and a provision in the by-laws that transfers of shares shall be made only on the corporate books, and that for a designated time before the annual meeting the transfer-book shall be closed, it has been held, that although the privilege of voting or of receiving dividends may be denied a purchaser of shares, who has not procured his transfer to be recorded, yet that he is eligible to

the office of director.⁷ The provision directing that no person shall be a director who is not a shareholder, or possessed of the required number of shares, applies only to elected directors and not to directors named in the special act of incorporation.⁸ The directors are not bound to take their qualification shares from the company itself. They may go upon the market and purchase them.⁹ There is a constitutional requirement in Illinois that a majority of the directors of a railway company must be citizens and residents of the State.¹⁰ A statutory provision by which a minority of the directors of a railway company are allowed to reside without the State will apply equally as well to a company owning a very short line, which they operate for their own private purposes, as to a company owning a more extended line, operated in the interest of the public.¹¹

1 N. Y. Laws of 1859, ch. 140, § 5.

2 *State v. Smith*, 15 Or. 98; *State v. Leete*, 16 Nev. 242; *Bartholomew v. Bentley*, 1 Ohio St. 37.

3 8 Vict. ch. 16, § 35.

4 *Chase v. Tuttle* (1888), 55 Conn. 455, construing Conn. Laws of 1876, p. 117, together with Conn. Laws of 1880, p. 561.

5 *State v. Ferris*, 42 Conn. 560.

6 *Budd v. Monroe*, 18 Hun, 316. *Contra*, *Bartholomew v. Bentley*, 1 Ohio St. 37.

7 *State v. Smith*, 15 Or. 98.

8 *Portal v. Emmens*, 1 Com. P. Div. 664, 667; *Brown & Theobald's Railway Law*, 101.

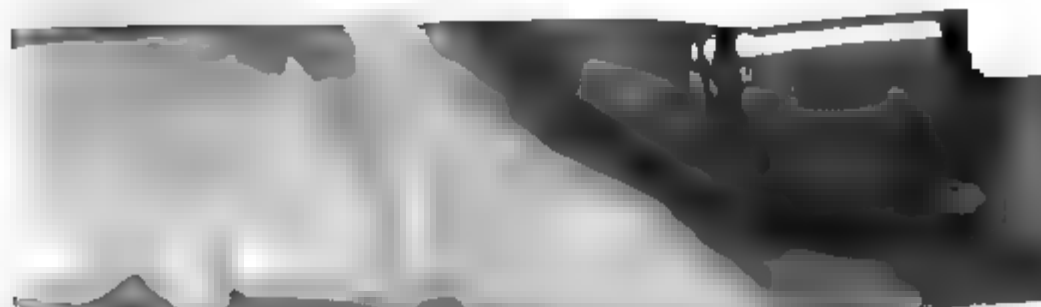
9 *State v. Leete*, 16 Nev. 242; *Jenner's Case*, 7 Ch. Div. 132; *Dent's & Forbes' Case*, Law R. 8 Ch. 768; *Brown's Case*, Law R. 9 Ch. 162; *Caruth's Case*, Law R. 20 Eq. 506. See *Chapman's Case*, Law R. 2 Eq. 567; *Austin's Case*, Law R. 2 Eq. 435. *Contra*, *Fowler's Case*, Law R. 14 Eq. 316; *Harward's Case*, Law R. 13 Eq. 30. *Cf.* *Hamley's Case*, 705.

10 Ill. Const. (1870) art. xi, § 11.

11 *State v. Smith*, 15 Or. 98.

§ 459. The election of an unqualified person, voidable merely.—The election of an unqualified

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person to a corporate office is not absolutely void, but voidable merely.¹ Accordingly, votes cast for a candidate who is not yet qualified to hold office, are not to be wholly disregarded in determining the result of the election,² although it has been said that under the English Companies' Clauses Acts the holding of the number of shares prescribed by the act of incorporation is a condition precedent to his election as a director.³ But the better rule would seem to be that the election of a person not holding the required number of shares is not invalid, for by accepting the office he is presumed to subscribe for the qualification shares;⁴ and although he may never actually have done so, he will be liable to corporate creditors as though he had.⁵ Even a person appointed director by the special act of incorporation is liable as a contributory for the number of shares necessary for his qualification, though he may never have acted as a director, and directors other than those named in the act of incorporation may have been appointed at the first general meeting.⁶ But merely accepting the office without actually serving as director does not render a person liable for the qualification shares where the acceptance has been afterward promptly retracted, on the ground of misrepresentations made to him by the promoters of the enterprise.⁷

1 *People v. Albany etc. R. R. Co.* 35 Barb. 341; *Cook on Stock & Stockh.* § 620. *Cf. Craw v. Easterly*, 54 N. Y. 679; *Easterly v. Barber*, 65 N. Y. 252.

2 *In re etc. of St. Lawrence Steamboat Co.* 41 N. J. 529. But votes cast for a person *disqualified* even to be a candidate, are to be wholly excluded: *State v. Thompson*, 27 Mo. 365, 363.

3 *Browne & Theobald's Railway Law*, 102, citing *Jenner's Case*, 7 Ch. Div. 132; *Miller's Case*, 5 Ch. Div. 70; 3 Ch. Div. 661; *Barber's Case*, 5 Ch. Div. 963; *Hamley's Case*, 5 Ch. Div. 705.

4 *Pearson's Case*, 5 Ch. Div. 338; *Hay's Case*, Law R. 10 Ch. 593, 604; *In re Great Oceanic Telegraph Co.* 41 Law J. Ch. 233; *Miller's Case*, 3 Ch. Div.

661; *Fowler's Case*, Law R. 14 Eq. 310; *Harward's Case*, Law R. 13 Eq. 30; *Midney's Case*, Law R. 13 Eq. 228; *Leck's Case*, Law R. 6 Ch. 469; *In re Englefield Colliery Co.* 8 Ch. Div. 388; *In re Empire Assurance Co.* Law R. 6 Ch. 469; *McKay's Case*, 2 Ch. Div. 1. *Contra*, *Marquis of Abercorn's Case*, 4 D. Cex. F. & J. 78; *Brown's Case*, 9 Ch. 102; *Stephenson's Case*, 45 Law J. Ch. 438. *Cf.* *In re British & American Telegraph Co.* Law R. 14 Eq. 316; *De Ruvigne's Case*, 5 Ch. Div. 306.

5 *Stephenson's Case*, 45 Law J. Ch. 438. *Cf.* *In re British & American Tel. Co.* Law R. 14 Eq. 316.

6 *Kincaid's Case*, 11 Eq. 192; *Browne & Theobald's Railway Law*, 101. *Cf.* *Portal v. Emmens*, 1 Ccm. P. Div. 201, 664.

7 *Caruth's Case*, Law R. 20 Eq. 536; *Taylor on Corporations*, § 614.

§ 460. **Disqualification after election.**—If a director at any time sells the shares upon which his qualification for the office depends, he thereby ceases to be a director.¹ But a pledge of his qualification shares by a director does not disqualify him to act.² And it seems that an equitable assignment by a director of his qualification shares will not deprive him of his office till the equitable title is completed by notice to the company.³ Under the English Companies' Clauses Act of 1845, if any of the directors at any time subsequently to his election accept or continue to hold any other office or place of trust or profit under the company, or be either directly or indirectly concerned in any contract with the company, or participate in any manner in the profits of any work to be done for the company, or if such director at any time cease to be a holder of the number of shares in the company prescribed by the act of incorporation, then in any of the cases aforesaid the office of such director shall become vacant, and thenceforth he shall cease from voting or acting as a director.⁴

1 *Easterly v. Barber*, 65 N. Y. 252; *Craw v. Easterly*, 54 N. Y. 679.

2 *Cumming v. Prescott*, 2 Younge & C. Ex. 488.

3 *Ex parte Littledale*, 24 Law J. Q. B. 9; *Browne & Theobald's Railway Law*, 102.

4 8 Vict. ch. 16, § 86; *Foster v. Oxford etc. R'y Co.* 13 Com. B. 20; S. C. 21 Law J. Com. B. 99; S. C. 17 Jur. 167; where it is held that although the director be disqualified by entering into the contract, yet that the contract itself remains valid.

§ 461. **Of the election of directors.**—When a company is organized, the persons composing its first board of directors are generally named in the charter or articles of association.¹ And unless thereby otherwise provided, they continue in office until the first ordinary meeting held in the year next after that in which the charter was granted; and at such meetings the shareholders present, personally or by proxy, may either continue in office the directors appointed by the special act of incorporation, or any number of them, or may elect a new body of directors, or directors to supply the places of those not continued in office, the directors appointed by the special act of incorporation being eligible as members of the new board.² If the original articles of association omit to name the directors they may be amended.³ The successors of the original directors are elected by the shareholders at the regular annual meetings.⁴ *Mandamus* will lie to compel an election of corporate officers, where those in authority omit, by accident or design, to do their duty in calling a meeting for that purpose; for if directors could keep themselves in office by not having an annual election, the stockholders would be powerless, and they might perpetuate themselves in power as long as they chose.⁵ The manner of conducting an election of corporate officers is not material, provided it violates no positive charter or statutory provision and is conducted by the authorized or proper persons.⁶ It is sufficient that it be conducted in good faith, and that

The stockholders have been given a fair opportunity for the expression of their wishes.' "Every principle of construction is in favor of full time, otherwise business may be badly done by being hurried or embarrassed and defeated by the raising of dilatory objections and protracted examination and discussion."⁸ But the rights of directors, being derived from their election alone, cannot be affected by the proceedings of an irregular and unofficial meeting of those shareholders, who remained after the adjournment of the regular meeting.⁹ Thus, the rights, as directors, of persons in fact elected at a meeting of the shareholders of a corporation for the election of directors, are not affected by the fact of the presiding officer having insisted on counting certain votes otherwise than as they should have been counted, of his having made a false announcement of the result of the election, of his having issued certificates of election to those not entitled to them, or of his having declared the meeting adjourned although a majority voted against adjournment.¹⁰ In New York it is enacted, that at every election of directors the books and papers of the company shall be exhibited to the meeting if a majority of the stockholders present shall require it.¹¹

1 See N. Y. Laws of 1850, ch. 140, § 1, requiring the names and places of residence of thirteen directors to be given in the articles of association.

2 8 Vict. ch. 16, § 83.

3 N. Y. Laws of 1872, ch. 523, § 1.

4 N. Y. Laws of 1850, ch. 140, § 5; 8 Vict. ch. 16, § 83.

5 *People v. Cummings*, 72 N. Y. 433; *People v. Albany Hospital*, 61 Barb. 397; *State of Nevada v. Wright*, 10 Nev. 167. Cf. *Brown v. Union Ins. Co.* 3 La. An. 177, 182; *Curry v. Woodward*, 53 Ala. 371, 375; *Knowlton v. Ackley*, 8 Utah. 93.

6 *Cook on Stock & Stockh.* § 606; *Fox v. Allensville etc., Turplike Co.* 46 Ind. 31.

7 *Philips v. Wickham*, 1 Paige, 590; *In re Chenango County Ins Co.* 9 Wend. 684.

8 *In re Mohawk etc. R. R. Co.* 19 Wend. 135; *Rex v. Mayor etc. of Coermarthen*, 1 Maule & S. 697. See *People v. Albany etc. R. R. Co.* 5 Barb. 344.

9 *State v. Smith*, 15 Or. 98.

10 *State v. Smith*, 15 Or. 98.

11 N. Y. Laws of 1850, ch. 140, § 5.

§ 462. Of the term of office of directors—Expiration of, not a revocation of authority of agent—Holding over.—In England the term of office of directors is regulated by the Companies' Clauses Act of 1845, which enacts that one-third of the directors longest in office shall retire annually, unless otherwise provided by the special act of incorporation; but that if the number of directors be not divisible by three, and the number of directors to retire be not prescribed in the act of incorporation, the directors shall in each case determine what number of directors, as nearly one-third as may be, shall go out of office, so that the whole number shall go out of office in three years.¹ In New York, directors of companies formed under the General Railroad Act of 1850, serve for one year, or until others are elected in their places.² If the stockholders fail to elect new directors, the incumbents continue in office until an election may be held.³ A board of directors is not essential to the existence of a corporation. The failure to hold annual meetings, or to elect officers regularly, does not operate as a forfeiture of the corporate franchises.⁴ The Companies' Clauses Act of 1845 provides that at the ordinary annual meeting of shareholders, the shareholders, present personally or by proxy, shall elect persons to supply the places of the directors then retiring from office, agreeably to the provis-

ions thereafter contained; and that the several persons elected at any such meeting, being neither removed nor disqualified, nor having resigned, shall continue to be directors until others are elected in their stead, as thereafter mentioned.¹ It is further provided by the same statute, that if at any meeting at which an election of directors ought to take place the quorum prescribed by the act of incorporation shall not be present within one hour from the time appointed for the meeting, no election of directors shall be made, but such meeting shall stand adjourned to the following day at the same time and place; and if at the meeting so adjourned the quorum prescribed by the act of incorporation be not present within one hour from the time appointed for the meeting, the existing directors shall continue to act and retain their powers, until new directors be appointed at the first ordinary meeting of the following year.² Where the election and term of office of the directors and officers of railway companies are regulated by statute, as in Alabama,³ which contemplates annual elections only, their term cannot be changed by the act of a majority of the directors in changing the time of the annual meeting of the stockholders, nor can the directors authorize the stockholders to elect a new board before the expiration of the term fixed by the statute.⁴ The authority of agents appointed by the directors is not terminated by the expiration of the term of the latter.⁵ In New York it is enacted, with respect to directors holding over after the expiration of their term, that whenever the directors named in the articles of association of any corporation organized under any general law of that

State, neglect or refuse, during the first year of the corporate existence, to adopt the by-law required by law to enable the stockholders to hold the annual election for directors, whereby the directors hold over after the expiration of the first year, all their acts and proceedings while holding over, done for and in the name of the company, designed to charge upon it any liability or obligation for the past services of any holding-over director, or for the past services of any officer or attorney, or counsel appointed by them, shall be considered fraudulent and void,¹⁰ and upon an action brought to enforce any such demand, when the company has, by the connivance of the holding-over directors, made default in the action or consented to the validity of the claim, any stockholder may apply to the court for a stay of proceedings, and set aside or vacate the same, provided the rights of no innocent third party, without notice, acquired for a valuable consideration, be injuriously affected thereby.¹¹

1 8 Vict. ch. 16, § 88.

2 N. Y. Laws of 1850, ch. 140, § 5. See, also, Ala. Code, §§ 1923, 1925.

3 *Moses v. Tompkins*, 84 Ala. 613; 4 R'y & Corp. Law J. 268, 270; *Smith v. Silver Valley Mining Co.* 64 Md. 85; *State v. Bonnell*, 35 Ohio St. 10, 17. See N. Y. Laws 1848, ch. 40, § 4.

4 *Moses v. Tompkins*, 84 Ala. 613; 4 R'y & Corp. Law J. 268, 270; Ala. Code (1886), §§ 1679-1681.

5 8 Vict. ch. 16, § 83.

6 8 Vict. ch. 16, § 84.

7 Ala. Code, §§ 1923, 1925.

8 *Nathan v. Tompkins*, 82 Ala. 437.

9 *Anderson v. Longden*, 1 Wheat. 85.

10 N. Y. Laws of 1835, ch. 489, § 1.

11 N. Y. Laws of 1885, ch. 489, § 2.

§ 463. Of the removal of directors, officers and agents.—Stockholders have no inherent power un-

der any doctrine of the common law to vary the contract entered into between them and the directors that the latter shall hold office for a given period; and no power of removal exists unless expressly conferred by statute or charter.¹ Illegal acts by newly elected directors cannot operate to re-nstate their predecessors.² And a director may bring an action against the company and his co-directors for wrongfully excluding him from acting as a director.³ But where a meeting of the shareholders has power to remove directors for reasonable cause, the court will not interfere in the absence of fraud, on the ground that the cause was not such as a court of justice would think reasonable.⁴ But while in the absence of statutory or charter authority, the shareholders cannot remove the directors by direct proceedings, yet illegally elected directors may be restrained from exercising the duties of the office, and in an action for that purpose the legality of their election may be inquired into.⁵ Thus, illegally elected directors may be restrained by injunction from selling a shareholder's stock for non-payment of calls, and from making future calls; and in a bill filed for that purpose by a shareholder, the legality of their election may be collaterally inquired into, although a bill could not be brought directly for the purpose of setting the election aside.⁶ In the case last cited it was sought also to enjoin the directors from using the property of the company for the purpose of extending the railway, upon the ground that the proposed extension was unauthorized and against the wishes of a majority of the shareholders; but it was decided that a permanent injunction would

not be granted therefor in the absence of allegations that the extension was *ultra vires*, or in breach of trust.⁷ When, however, the shareholders have the power to remove the directors, the court will not restrain them from performing the duties of their office.⁸ To remove an officer of a private corporation on the ground that the meeting at which he was elected was illegal, and that as to the time for holding such meeting he deceived the relators, the information must not necessarily contain an averment that had the relators been present they would have voted against him.⁹ When an action to set aside an election of directors is maintainable, it may be brought by a shareholder, even though when the election took place he was not entitled to vote, by reason of not having been registered as a shareholder for the requisite time before the meeting.¹⁰ Agents holding office at the pleasure of superior officers may be dismissed without cause.¹¹

1 *Beardsley v. Johnson*, 1 N. Y. Suppl. 608; *Ex parte Paine*, 1 Hill, 635; *State v. Bryce*, 7 Ohio, (pt. 2d), 82; *Imperial etc. Hotel Co. v. Hanp-son*, 23 Ch. Div. 1, 7; *Cook on Stock & Stockh.* § 627. *Contra*, *Bury v. McDonald*, 3 Freem. Ch. (Miss.) 151.

2 *Beardsley v. Johnson*, 1 N. Y. Suppl. 608.

3 *Pulbrook v. Richmond Mining Co.* 9 Ch. Div. 610.

4 *Inderwick v. Snell*, 2 Macn. & G. 217; *Browne & Theobald's Railway Law*, 104.

5 *Moses v. Tompkins*, 84 Ala. 613; 4 R'y & Corp. Law J. 268.

6 *Moses v. Tompkins*, 84 Ala. 613; 4 R'y & Corp. Law J. 268.

7 *Moses v. Tompkins*, 84 Ala. 613; 4 R'y & Corp. Law J. 268.

8 *Hattersley v. Earl of Shelburne*, 10 Week. R. 861; 31 Law J. Ch. 873; *Browne & Theobald's Railway Law*, 104.

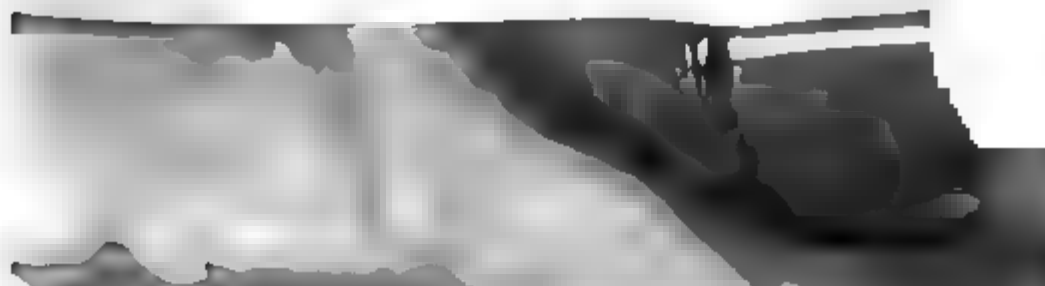
9 *Armington v. State*, 95 Ind. 421.

10 *Wright v. Central California etc. Co.* 67 Cal. 532.

11 *Hunter v. Sun Mutual Ins. Co.* 26 La. An. 13.

§ 464 **Of supplying vacancies.**—The manner of supplying vacancies upon the board of directors

is generally regulated by the by-laws of the company.¹ Provision is sometimes made for vacancies, by statute or charter, by authorizing the directors to fill vacancies temporarily, until the next regular meeting of the shareholders,² or for the unexpired terms of those in whose place they are elected.³ Thus, under the Companies' Clauses Act of 1845, it is provided that if any director die, or resign, or become disqualified or incompetent to act as a director, or cease to be a director by any other cause than that of going out of office by rotation, as therein provided, the remaining directors if they think proper so to do, may elect in his place some other shareholder, duly qualified to be a director; and the shareholder so elected to fill up any such vacancy shall continue in office as a director so long only as the person in whose place he shall have been elected would have been entitled to continue if he had remained in office.⁴ When such authority is conferred upon the directors, it is exclusive, and the vacancies cannot be filled by the stockholders at a special meeting.⁵ But, where the vacancies have reduced the directors to a number less than the minimum prescribed by the articles of association as necessary to constitute a board, although there remain a number sufficient to constitute a quorum, if a legally constituted board were in existence, they cannot validly elect new directors to fill the vacancies.⁶ Thus, where five of seven directors designated by the act of incorporation became disqualified to serve, it was held that the two remaining directors could not fill the vacancies thereby occasioned.⁷ The corpora-



tion is not, however, thereby dissolved, for a board of directors is not essential to corporate existence.¹

1 See N. Y. Laws of 1850, ch. 140, § 5, where it is enacted that "vacancies in the board of directors shall be filled in such manner as shall be prescribed by the by-laws of the corporation.

2 Ala. Code, § 1924. See *Moses v. Tompkins* and *Moses v. Woodson* (reported together, Ala. 1888), 4 R'y & Corp. Law J. 268.

3 8 Vict. ch. 16, § 89.

4 *Moses v. Tompkins* and *Moses v. Woodson* (reported together, Ala. 1888), 4 R'y & Corp. Law J. 238, 270, citing *Gashwiler v. Willis*, 33 Cal 11; 91 Am. Dec. 607.

5 *Four Electric Co. v. Phillipart* (Q. B. Div. 1898), 4 R'y & Corp. Law J. 319, 322, citing *Bottomley's case*, 16 Ch. Div. 681.

6 *Moses v. Tompkins*, 84 Ala. 613; 4 R'y & Corp. Law J. 263.

7 *Moses v. Tompkins*, 84 Ala. 613; 4 R'y & Corp. Law J. 238.

§ 465. **Directors' meetings—Of the place and time.**—While a corporation may not validly transact any business relating to its internal polity beyond the limits of the incorporating State, it may act in foreign States through the medium of its agents;¹ and directors, being merely corporate agents, may lawfully hold meetings in a foreign State.² It would certainly be an extraordinary anomaly if, while by the comity prevailing between the States the corporation is allowed through its agents to conduct its business in a State other than that from which it derives its charter, it could disavow the acts of those whom it has appointed to direct its business in another State, on the ground that the votes by which they were done were passed in that State.³ In England, it is enacted by the Companies' Clauses Act of 1845 that the directors shall hold meetings at such times as they shall appoint for the purpose, and they may meet and adjourn as they think proper from time to time, and from place to place; that at any time any two of the directors may require the secretary to call a meeting of

the directors, and in order to constitute a meeting of directors there shall be present at the least the quorum prescribed in the act of incorporation, and when no quorum shall be prescribed in the act of incorporation, there shall be present at least one-third of the directors; that all questions at any such meeting shall be determined by the majority of votes present, and in case of an equal division of votes the chairman shall have a casting vote in addition to his vote as one of the directors.¹

¹ *Saltmarsh v. Spaulding* (1868), 147 Mass. 224, 4 Ry. & Corp. Law J. 151, 153, distinguishing *Miller v. Ewer*, 37 Mo. 503, 46 Am. Dec. 619, which only holds that a corporation chartered in one State may not organize in another State. See, also, Angell & Ames on Corporations, § 274.

² *Galveston Railroad v. Cowdery*, 11 Wall. 459, 476; *Smith v. Alford*, 83 Barb. 415; *Wood Hydraulic etc. Co. v. King*, 45 Ga. 34; *McCall v. Bureau Manuf. Co.* 6 Conn. 428; *Ames v. Conant*, 36 Vt. 744; *Ohio etc. R. R. Co. v. McPherson*, 36 Mo. 13; 36 Am. Dec. 128; *Ballows v. Todd*, 30 Iowa, 202, 217; *Wright v. Bundy*, 11 Ind. 398, 404.

³ *Saltmarsh v. Spaulding*, 147 Mass. 224, distinguishing *Miller v. Ewer*, 37 Mo. 503, 46 Am. Dec. 619, cited by Angell & Ames on Corporations, § 274; but which only holds that a corporation cannot organize in another State.

⁴ 8 Vict. ch. 16, § 93.

§ 466. Directors' meetings — Of notice. — A quorum of a board of directors can act for the company only at a meeting of the board duly summoned with proper notice.¹ Provision is often made in the by-laws of the company with respect to notice of directors' meetings, and the matter is sometimes regulated by statute. Thus, under the California civil code,² it is required, that "when no provision is made in the by-laws for regular meetings of the directors and the mode of calling special meetings, all meetings must be called by special notice in writing, to be given to each director by the secretary." Under such a statute an adjourned meeting is considered a special meeting, and ac-

cordingly, where a regular meeting was adjourned to the next day on account of the absence of some of the directors, and no notice of the adjournment was given to the absent directors, an assessment levied at the adjourned meeting was void.¹ Want of notice may be cured by subsequent ratification of the proceedings of a meeting held without notice. In a late case in point, where the action of the directors at a special meeting was ratified at a subsequent special meeting, of which all the directors had legal notice, and at the next regular meeting "the minutes of the last two meetings were read and approved," it was considered immaterial whether all the directors were legally notified of the first special meeting, in the absence of fraud or conspiracy on the part of the officers or directors.² So again, in another recent decision, where stock of the company had been issued to its president as compensation for his services and by way of payment for sums of money advanced to it by him, and all the parties interested countenanced or ratified his dealing with the stock as owner thereof, it was decided that his title thereto could not be impeached for want of notice to the directors of the meeting at which the resolution was passed in accordance with which the stock was issued.³

¹ *In re Homer District Consolidated Gold Mines, Limited* (Ch. Div. 1905), 4 E'y & Corp. Law J. 143.

² § 330.

³ *Thompson v. Williams*, 76 Cal. 163, construing Cal. Civ. Code, § 359.

⁴ *County Court v. Baltimore etc. R. R. Co.* (1905) 25 Fed. Rep. 161.

⁵ *Reed v. Hoyt* (N. Y. 1905), 4 E'y & Corp. Law J. 135, 137.

§ 467. Directors' meetings — Organization — Proceedings—Minutes—Presumption of regularity.—In England it is enacted that at the first

meeting of directors held after the passing of the special act of incorporation, and at the first meeting of the directors held after each annual appointment of directors, those present shall choose one of the directors to act as chairman for the year following, and shall also, if they think fit, choose another director to act as deputy chairman for the same period; and if the chairman or deputy chairman die or resign, or cease to be a director, or otherwise become disqualified to act, the directors present at the meeting next after the occurrence of the vacancy shall choose some other of the directors to fill such vacancy; and every such chairman or deputy chairman so elected as last aforesaid shall continue in office so long only as the person in whose stead he may be so elected would have been entitled to continue if such death, resignation, removal, or disqualification had not happened.¹ If at any meeting of the directors neither the chairman nor deputy chairman be present, the directors present shall choose some one of their number to be chairman of such meeting.² As in shareholders' meetings, so in those of a board of directors, the majority controls; but in the meetings of directors the majority is reckoned *per capita*, and not upon the basis of the amount of stock held by the members of the board. Under a provision in the by-laws of a corporation that a majority vote of the directors shall be necessary to determine the action of the body, the presence of a majority of all the directors will be required, but a resolution will be binding if agreed to by a majority of those present.³ With respect to the minutes of directors' meetings, the English Companies' Clauses Act of 1845 provides

that the directors shall cause notes, minutes, or copies, as the case may require, of all appointments made or contracts entered into by the directors, and of the orders and proceedings of all meetings of the company, and of the directors and committees of directors, to be duly entered in books, to be from time to time provided for the purpose, which shall be kept under the superintendence of the directors, and every such entry shall be signed by the chairman of such meeting; and such entry, so signed, shall be received as evidence in all courts, and before all judges, justices, and others, without proof of such respective meetings having been duly convened or held, or of the persons making or entering such orders or proceedings being shareholders or directors or members of committee respectively, or of the signature of the chairman, or of the fact of his having been chairman, all of which last-mentioned matters shall be presumed, until the contrary be proved.⁴ The minutes need not be signed on the day on which they are entered. It is sufficient that they should be signed by the person who was the chairman of the meeting, and they may be signed, or signed as confirmed, at a subsequent meeting;⁵ and where a meeting for a particular purpose is adjourned, and the minutes of the adjourned meeting only are signed by the chairman, the whole of the minutes are admissible in evidence.⁶ The presumption of regularity arising from entries in the minutes applies equally to the meetings of directors and those of stockholders.⁷

1 8 Vict. ch. 16, § 93.

2 8 Vict. ch. 16, § 94.

3 *Foster v. Mullanphy Planing Mill Co.* 92 Mo. 79.

4 8 Vict. ch. 16, § 98.

5 *West London R'y Co. v. Bernard*, 3 Rob. C. 649; *London etc. R'y Co. v. Fairclough*, 2 Macn. & G. 674; S. C. 2 R'y Cas. 215; *Southampton Dock Co. v. Richards*, 1 Macn. & G. 448.

6 *Miles v. Bough*, 3 Q. B. 845; *Inglis v. Great Northern R'y*, 16 Jur. 895; *Browne & Theobald's Railway Law*, 114.

7 *Vide supra*, § 455.

§ 468. **The extent of the powers of directors—**
The general rule.—It is frequently provided by the charter, or the enabling act under which the corporation is organized, that the directors shall “manage its affairs,” as in the General Railroad Act of New York,¹ or that “the powers of the corporation shall be exercised by a board of directors.” These provisions are construed to vest in them full authority to act for the corporation in all ordinary matters within the scope of its charter powers.² And powers expressly conferred upon the directors exclude the action of the shareholders therein.³ The English Companies' Clauses Act of 1845, provides at length, that the directors shall have the management and superintendence of the affairs of the company, and that they may lawfully exercise all the powers of the company, except as to such matters as are directed by that act, or by the special act of incorporation, to be transacted by a general meeting of the company; but that all the powers so to be exercised, shall be exercised in accordance with and subject to the provisions of the act, and of the special act of incorporation; and shall be subject also to the control and regulation of any general meeting specially convened for the purpose, but not so as to render invalid any act done by the directors prior to any resolution passed by the general meeting. In Michigan, where the common-law rule prevails, the directors have powers

co-extensive with those of the corporation, and have not a mere delegated authority as a common agent.¹

¹ N. Y. Laws of 1880, ch. 146, § 8.

² Bank of United States v. Dandridge, 19 Wheat. 112, per MARSHALL, C. J.; Hoyt v. Thompson, 19 N. Y. 207, 218; Tripp v. Swansey Paper Co. 13 Pick. 261; Burrill v. Nohant Bank, 2 Met. 163, 166; 36 Am. Dec. 266; Dana v. Bank of United States, 5 Watts & S. 240, 246; Bank of Kanawha v. Schuykill Bank, 1 Parsons Bal. Cas. 238; Sims v. Street Railroad Co. 9 Ohio St. 566; Wood v. Whelan, 83 Ill. 153; Wright v. Oroville Manuf. Co. 40 Cal. 20; Maynard v. Fireman's Fund Ins. Co. 34 Cal. 48, 91 Am. Dec. 672. Compare Beatty v. Knowler's Lessee, 4 Pet. 122; Bargeat v. Shortridge, 5 H. L. Cas. 2. See further, upon the extent of the authority of directors, Nashua etc. R. R. Co. v. Boston etc. R. R. Co. 17 Fed. Rep. 271, where, under an agreement between two railway companies for the joint management of their lines, including certain leased roads, the proportion of the net earnings to be drawn by each being set forth, the directors of one company authorized the interest on the cost of a new depot, built by the other for the benefit of the joint traffic, to be deducted from the net earnings, they were held not to have exceeded their powers.

³ Coore v. Port Henry Iron Co. 13 Barb. 27, where, the directors having authority to make a lease, a lease made by the stockholders was void. Vide *infra*, § 471.

⁴ 8 Vt. ch. 14, § 69.

⁵ Illin v. Kansas Canal etc. Co. 65 Cal. 592.

§ 469. The same subject, continued.—Certain powers enumerated.—Directors have authority to amend by-laws adopted by themselves, where the articles of association providing for a board of directors and their meetings, and the management of the corporation by them, make no provision for corporate meetings;¹ to place unsubscribed stock;² to bring suit and employ counsel for the company;³ to compromise a pending suit;⁴ to make contracts to pool earnings;⁵ to regulate rates and enter into contracts to carry at a certain rate for a specified time;⁶ and, under certain restrictions, to alter the proposed route of the railway.⁷ Under authority to bind a corporation by contract and note, the directors may make the company liable for items of account against which the statute of limitations might otherwise have been effectually interposed as

a bar to recovery.¹ Where the by-laws of a corporation confer upon the directors the management and control of the business, it has been held that they may make a valid mortgage of its real estate.² Directors of an insolvent company have authority to make an assignment of all the corporate property for the benefit of creditors.¹⁰

1 *Heintzelman v. Druids' Relief Assoc.* (1888), 38 Minn. 133.

2 *Bims v. Street R. R. Co.* 37 Ohio St. 554.

3 *Pollock v. Shultz*, 1 Hun, 320.

4 *Donohoe v. Mariposa etc. R. R. Co.* 66 Cal. 317.

5 *Elkins v. Camden etc. R. R. Co.* 38 N. J. Eq. 241.

6 *Railroad Co. v. Furnace Co.* 37 Ohio St. 321; 41 Am. Rep. 509.

7 N. Y. Laws of 1850, ch. 140, § 23. *Cf.* N. Y. Laws of 1864, ch. 282, § 17, as to changing the point of intersection with canals.

8 *Bliss v. Kaweah Canal etc. Co.* 65 Cal. 502.

9 *Saltmarsh v. Spaulding*, 147 Mass. 224; 4 R'y & Corp. Law J. 151.

10 *Duncomb v. New York etc. R. R. Co.* 88 N. Y. 1; 8 O. 84 N. Y. 190; *Chamberlain v. Bromberg*, 83 Ala. 676.

§ 470. The same subject, continued—Certain acts not to be done by the directors.—The power to effect any great or radical changes in the organization of the corporation,¹ or to do any act involving a departure from the original purpose of incorporation, is reserved to the stockholders, and cannot be exercised by the directors.² Accordingly, the directors cannot change the purpose of incorporation, nor accept any material alteration in the charter of the company;³ but they may accept, without obtaining the consent of the shareholders, an enabling act merely extending the privileges of the company.⁴ They may not increase or diminish the capital stock,⁵ nor issue stock below par.⁶ They cannot lease the road without special authority,⁷ nor wind up the company.⁸ They cannot, out of the funds of the company, pay for litigation under-

taken for their own protection as directors.⁹ They cannot pay for the stamps on proxies or the return postage of proxies; and if they send out proxies to secure votes for themselves they cannot charge the cost of printing or posting them against the company.¹⁰ A single director cannot, by virtue of his office, sell the bonds of the road.¹¹ Nor can all of them lease the railway for a term of years of substantial length as practically to be equivalent to a sale without obtaining the consent of the stockholders. Directors cannot bind the corporation by contracts foreign to the purposes for which it was incorporated;¹² but a company may be bound by contracts duly entered into by the directors for purposes which it has treated as within the objects of the incorporation, and which cannot be clearly shown not to fall within them.¹⁴ Thus, a company may be bound by a continuous course of dealing by its directors with third persons in relation to its shares although that mode of dealing be contrary to the deed of management.¹⁵

1 *Eidman v. Bowman*, 58 Ill. 444; 11 Am. Rep. 90.

2 *Wood v. Whilen*, 93 Ill. 153. *Vide supra*, § 404.

3 *Whittier v. Mississippi etc. R. R. Co.* 20 Ark. 463; *Sprague v. Illinois River R. R. Co.* 19 Ill. 174. *Vide supra*, § 404. But see *Dayton v. R. R. Co. v. Hatch*, 1 Disney, 86; *Illinois River R. R. Co. v. Zimmerman*, Ill. 654; *Banet v. Alton etc. R. R. Co.* 13 Ill. 504, 508. *Cf. Railway Co. v. Allerton*, 18 Wall. 233, 235.

4 *Eastern R. R. Co. v. Boston etc. R. R. Co.* 111 Mass. 125; 15 Am. Rep. 13; *Joy v. Jackson etc. Plank Road Co.* 11 Mich. 155, 170.

5 *Railway Co. v. Allerton*, 18 Wall. 233, 234; *In re Wheeler*, 2 Abb. P. N. S. 361; *Eidman v. Bowman*, 58 Ill. 444; 11 Am. Rep. 90. *Vide supra*, § 331.

6 *Sturges v. Stetson*, 1 Biss. 216.

7 *Stevens v. Davison*, 18 Gratt. 819; 98 Am. Dec. 692; *Penobscot etc. R. R. Co. v. Dunn*, 39 Me. 587, 601; *Bedford R. R. Co. v. Bowser*, 48 Pa. St. 23, 37; *Kersey Oil Co. v. Oil Creek etc. R. R. Co.* 12 Phila. 374.

8 *Smith v. Smith*, 3 Desaus. Ch. 547; *Angell & Ames on Corporations*, § 772.

9 *Studdert v. Grosvenor*, 33 Ch. Div. 528.

10 *Studdert v. Grosvenor*, 33 Ch. Div. 528; *Browne & Theobald's Railway Law*, 104.

Titus v. Cairo etc. R. R. Co. 37 N. J. 98.

Metropolitan Elevated R'y Co. v. Manhattan Elevated R'y Co. 11 N. Y. 3, 3, S. C. 14 Abb. N. C. 103.

1. *Eastern Counties R'y Co. v. Hawkes*, 5 H. L. Cas. 331; *Bargate v. Stridge*, 5 H. L. Cas. 297.

2. *Eastern Counties R'y Co. v. Hawkes*, 5 H. L. Cas. 331; *Bargate v. Stridge*, 5 H. L. Cas. 297.

3. *Eastern Counties R'y Co. v. Hawkes*, 5 H. L. Cas. 331, 331.

§ 471. The discretion of the directors not to be questioned.—Directors have the right to manage the affairs of the company within the scope of their discretion, without interference on the part of the shareholders, so long as they conduct them in good faith and are not guilty of culpable negligence.¹ Even a majority of the shareholders cannot assume to act in those matters which have been delegated to the directors, nor to interfere therein.² For, within the sphere of their duties the right of the directors to act is undoubtedly exclusive, and all corporate acts must be done through them as the sole executive and administrative authority.³ In England, however, the powers delegated to the directors are subject to the control and regulation of any general meeting especially convened for that purpose, but not to such an extent as to render invalid any act done by the directors prior to any resolution passed by such a general meeting.⁴

1. *Railway Co. v. Alling*, 99 U. S. 463; *Park v. Grant Locomotive Works*, 19 N. J. Eq. 114; *Elkins v. Camden etc. R. R. Co.* 36 N. J. Eq. 241. *Id.* *supra*, § 415, 417, 418.

2. *Railway Co. v. Alling*, 99 U. S. 463; *Elkins v. Camden etc. R. R. Co.* 36 N. J. Eq. 241.

3. *Metropolitan Elevated R'y Co. v. Manhattan Elevated R'y Co.* 11 N. Y. 377; S. C. 15 Am. & Eng. R'y Cas. 1, per VAN BRUNT, J.; *Coar v. Port Henry Iron Co.* 12 Barb. 27, cited *supra*, § 468.

4. 8 Vict. ch. 16, § 90.

§ 472. The discretionary powers of directors not to be delegated.—Directors cannot delegate to



others those powers the exercise of which has been intrusted to their discretion,¹ such as the allotment of shares,² unless that power has been conferred upon them,³ the making of calls,⁴ the ordering of a sale of shares upon the failure to pay calls,⁵ and the declaring of dividends.⁶ But while they cannot validly delegate any of their discretionary powers to an agent, yet they may, after having determined that an act shall be done, delegate the formal execution thereof to others.⁷

1 *Saltmarsh v. Spaulding* (Mass. 1883), 4 R'y & Corp. Law J. 151, 12; *Silver Hook Road v. Greene*, 12 R. I. 164. But see *Hoyt v. Thompson*, 9 N. Y. 207; *Burrill v. Nahant Bank*, 2 Met. 163, 36 Am. Dec. 395.

2 *Howard's Case*, 38 Law J. Eq. 42; *Cartmel's Case*, 43 Law J. Eq. 381.

3 *Harris's Case*, Law R. 7 Ch. 587.

4 *Silver Hook Road v. Greene*, 12 R. I. 164. *Vide supra*, § 157.

5 *York etc. R. R. Co. v. Ritchie*, 40 Me. 425.

6 *Vide supra*, § 308.

7 *Saltmarsh v. Spaulding*, 147 Mass. 224; 4 R'y & Corp. Law J. 151, 12; *Burrill v. Bank*, 2 Met. 163, 35 Am. Dec. 395.

§ 478. Of the delegation of powers to committees—The English statute.—In England, by the Companies' Clauses Act of 1845, the directors of a corporation are authorized to delegate their powers to one or more committees of their own number; and they may grant to those committees respectively power on behalf of the company to do any acts relating to the affairs of the company which the directors could lawfully do, and which they shall from time to time think proper to intrust to them.¹ The power which may be granted to any committee to make contracts, as well as the power of the directors to make contracts on behalf of the company, may lawfully be exercised with respect to any contract which, if made between private persons, would be by law required to

be in writing and under seal, and the committee or the directors may make such a contract on behalf of the company in writing, and under the common seal of the company, and in the same manner may vary or discharge it.¹ Committees thus appointed may meet from time to time, and may adjourn from place to place, as they think proper for carrying into effect the purposes of their appointment; but no committee shall exercise the powers intrusted to them except at a meeting at which there shall be present the quorum prescribed in the act of incorporation, or if no quorum be prescribed thereby, then a quorum to be fixed for that purpose by the general body of directors; and at all meetings of the committees one of the members present shall be appointed chairman; and all questions at any meeting of the committee shall be determined by a majority of votes of the members present, and in case of an equal division of votes, the chairman shall have a casting vote in addition to his vote as a member of the committee.²

1 8 Vict. ch. 16, § 95.

2 8 Vict. ch. 16, § 97.

3 8 Vict. ch. 15, § 98.

§ 474. The appointment of agents need not be under seal, nor by formal vote.—Agents of a corporation need not be appointed under seal,¹ nor even by a formal vote of those having the power of appointment. Thus, where each stockholder of a joint-stock corporation organized under the laws of Connecticut was also a director, and, in that capacity, united in appointing one of their number agent of the corporation to enter into and perform contracts in its name, although no formal meeting had

been called for that purpose, no formal vote taken and no records made, it was decided that the appointment was valid and the acts of the agent in pursuance of the authority thus conferred were binding on the corporation.² In Indiana it is required by statute that the appointment of a person by a foreign corporation to act as its agent in that State must be made a matter of record.³

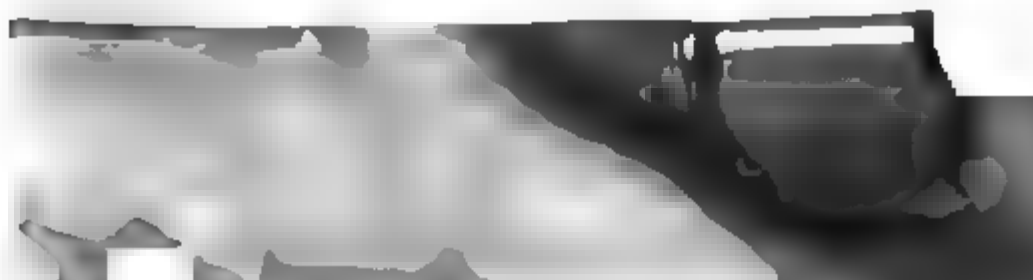
1 *Bank of Columbia v. Patterson*, 7 Cranch, 299, 305; *Randall v. F. Vechten*, 19 Johns. 60; 10 Am. Dec. 193; *Faviell v. Eastern Counties Ry.* 2 Ex. 344; *Brown & Theobald's Railway Law*, 108; *Angell & Ames on Corporations*, § 283.

2 *Wood v. Wiley Construction Co.* 56 Conn. 87.

3 *Ind. Rev. Stat.* (1881) § 3022; *Morrow v. United States Mortgage Co.* 96 Ind. 21.

§ 475. The fiduciary relation of directors to the corporation and its creditors.—No corporate officer should do anything to create a conflict between his own interests and those of the company. Indeed, it is not going too far to say that every director of a company is bound, when his personal interests conflict with his duty to the shareholders, either to perform his duty toward them at a sacrifice of his own interest,² or to resign his office.³ A superintendent and director cannot allege his own acts, in his official capacity, as the basis of an action against the company, brought by him as an individual, to recover damages for an alleged illegal interference with his rights.⁴ The officers and directors of a company not only stand in a fiduciary relation toward the corporation itself and its shareholders, but they are trustees for the benefit of corporate creditors also.⁵ Accordingly, they cannot lawfully divert the corporate property from the payment of the debts of the company; and credit-

ers prejudiced by their so doing will be granted relief.* Thus, where corporate property, alleged to have been diverted from the payment of the debts of the corporation, is shown to have been sold to one of the directors, who occupied the position of both buyer and seller in the transaction, the burden of proof will be upon the directors to show both that the sale was *bona fide*, and that it brought the full value of the property, and in case of their failure to do so, the creditors may recover of the directors taking part in the sale for the loss sustained by them in consequence.⁷ It has been held, however, not to be a breach of trust, so as to subject them to personal liability, for the directors of an insolvent corporation, which was still a "going concern," advantageously to sell the assets of the corporation, all of which had been attached, to one of the attaching creditors, on the condition that he was to cancel his own debt as well as those of the other attaching creditors, it appearing that the sale had been advised by counsel, and that no means were in the hands of the directors with which to contest the attachment suits;⁸ and so, too, where certain persons, with the intention of reorganizing an insolvent railway company, employed an attorney, who was also a director of the company, to purchase the claims of creditors, which he did, but without disclosing to them the plan of reorganization, it was held that, as director, he was bound to use the utmost good faith in dealing with the company's creditors, but that he would not be charged with constructive fraud, it appearing that they were paid all that their claims were worth.⁹



1 *Sellers v. Phoenix Iron Works Co.* 13 Fed. Rep. 20; *Cumberland etc. Co. v. Parish*, 42 Md. 536, 605; *McAlister v. Woodcock*, 80 Mo. 174; *Ber-
st v. Stratman*, 4 Mo. App. 41; *Palme v. Lake Erie etc. R. R. Co.* 3 L.
283, 357; *Hill v. Frasier*, 22 Pa. St. 330; *Attaway v. Third National Bank*, 2
Mo. (1887) 485; *Goodin v. Cincinnati etc. Co.* 18 Ohio St. 169, 38 Am. Dec.
95; *First National Bank v. Reed*, 36 Mich. 253; *Ex parte Larkin*, 4 Ch. D.
543; *Michoud v. Girod*, 4 How. 553, where it was said, "The guarantee
of law stands upon our great moral obligation to refrain from placing
ourselves in relations which ordinarily excite a conflict between self-in-
terest and integrity."

2 *Lindley on Partnership*, 590; *Aberdeen R'y Co. v. Blake* 1 Mass. 82.

3 *Goodin v. Cincinnati etc. Co.* 18 Ohio St. 169; 38 Am. Dec. 95.

4 *Budd v. Multnomah St. R'y Co.* 13 Or. 271, 83 Am. Rep. 358.

5 *Wilkinson v. Bauerle*, 41 N. J. Eq. 635; *Powell v. Willamette Valley
R. R. Co.* 14 Or. 356; *Thomas v. Sweet*, 37 Kan. 153. Cf. *White etc.
Manuf. Co. v. Pettis Importing Co.* 33 Fed. Rep. 584.

6 *Wilkinson v. Bauerle*, 41 N. J. Eq. 635.

7 *Wilkinson v. Bauerle*, 41 N. J. Eq. 635.

8 *White etc. Manuf. Co. v. Pettis Importing Co.* 33 Fed. Rep. 584.

9 *Powell v. Willamette Valley R. R. Co.* 14 Or. 356.

§ 476. Of transactions between two companies having directors in common.—One agent may validly act in a transaction for two adversely interested corporations if there be no improper concealment of his double agency.¹ And ordinarily a contract between two corporations cannot be impeached merely upon the ground that a minority of the directors of one company are directors of the other also.² Where a majority of the board are not adversely interested, and have no adverse employment, the right to avoid the contract or transaction does not exist without proof of fraud or unfairness.³ This, however, has been denied in New York. In that State, when two corporations enter into a contract with each other, parties holding the position of directors in both corporations consenting thereto, but the shareholders not being advised with, the contract is voidable, even though at the election of the directors the stockholders were cognizant of the fact that some of them belonged to the board of the

other corporation, and even though the contract be confirmed by a majority of directors without taking into account those who are members of both boards.⁴ But although, in relation to ordinary dealings between corporations having directors in common, the rule as stated above would seem to be the more reasonable, yet it cannot be held to apply to any arrangements by directors of a railroad company to secure an undue advantage at its expense by the formation of a new company as auxiliary to the original one, with an understanding that they, or some of them, shall take stock in it, and then that valuable contracts shall be given it, in the profits of which they, as stockholders of the new company, are to share. Such transactions are only so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the courts for consideration.⁵ Another exception to the rule is well illustrated by a recent case in West Virginia, where the board of directors of an insolvent corporation conveyed all its property to secure a debt due from it to another corporation, at a meeting in which one or more of the directors participating and voting for the conveyance were also directors of the other company; and it was held to be *prima facie* fraudulent and void as to the grantor, its stockholders, and creditors; clear and convincing proof being required to show that the conveyance was fair, reasonable, and free from fraud.⁶

⁴ Bradley v Richardson, 23 Vt. 720; Adams Mining Co. v. Senter, 23 Mich. 73; Taylor on Corporations, § 642. But see San Diego v. San Diego etc. R. R. Co. 44 Cal. 136.

2 *Mayor etc. of Griffin v. Inman*, 57 Ga. 370; *United States Rolling Stock Co. v. Atlantic etc. R. R. Co.* 34 Ohio St. 450. See also *Booth v. Robinson*, 55 Md. 419; *Foster v. Oxford etc. Ry. Co.* 13 Com. B. 2-9, 233; *Cont. a. Bell v. Western Union Tel. Co.* 16 Fed. Rep. 14; *San Diego v. San Diego etc. R. R. Co.* 44 Cal. 106.

3 *United States Rolling Stock Co. v. Atlantic etc. R. R. Co.* 34 Ohio St. 450; 32 Am. Rep. 280.

4 *Metropolitan Elevated Ry. Co. v. Manhattan Elevated Ry. Co.* 11 Daly, 373; 8 O. 14 Abb. N. O. 103.

5 *Wardell v. Railroad Co.* 103 U. S. 651, 652.

6 *Sweeney v. Grape Sugar Co.* 30 W. Va. 443.

§ 477. Of transactions between directors and the corporation.—Independently of statute, there is no principle of the common law rendering a contract between a corporation and its directors, entered into in good faith on the part of the latter, absolutely void.¹ Thus, a director, making a *bona-fide* advance of money to a corporation, which is accepted and expended for the necessary purposes of the corporation, has a legal claim against the corporation.² For a director of a corporation is not prohibited from lending it moneys when needed, if the transaction be open, and otherwise without blame; nor is his subsequent purchase of its property at a fair public sale by a trustee under a trust deed executed to secure the repayment of his loan, invalid.³ And in the absence of an allegation that the demands are unjust, or that the mortgage was acquired through unfair means, neither actual nor constructive fraud will be presumed to attend a sale under it, nor will it be regarded as in trust for other creditors.⁴ Even had such a transaction not been in good faith, it could not be questioned by a purchaser of the property at an execution sale in a suit against the corporation, but only by the corporation itself or its stockholders.⁵ Thus, in a recent case in Massachusetts, a corporation having

borrowed money from its directors and secretary, and being in need of funds for its business, negotiated its note, secured by a conveyance of all its property, and with part of the proceeds paid the loans of its directors and secretary, and with the balance bought material and defrayed legitimate expenses. Subsequently its property was sold for its full market value, and the proceeds applied, as far as they went, to the payment of the note. It was held, that as all the transactions were in good faith and in the due course of business, a creditor whose debt had not been paid had no claim on the directors individually for the payment of it.¹ The mere fact that one of the directors was interested in a purchase made by a corporation will not avoid the purchase, no damage appearing to have resulted to the shareholder making the complaint.² In England, under the Companies' Clauses Act of 1845,³ if a director is interested in a contract with the company, while the contract is not void, he will be disqualified to act as director.⁴ But where a contract between a corporation and one of its directors was made in the form of a resolution, to pass which the director was obliged to cast his vote, the contract was held invalid.⁵

1 Knowles v. Duffy, 40 Hun, 495; Budd v. Walla Walla etc. Co. 2 Wash. 317; Santa Cruz R. R. Co. v. Spreckles, 65 Cal. 193; Hill v. Nisbet, 100 Ind. 341.

2 Santa Cruz R. R. Co. v. Spreckles, 65 Cal. 193.

3 *Saltmarsh v. Spaulding* (Mass. 1893), 4 R'y & Corp. Law J. 151, 153, cit n; *Twin Lick Oil Co. v. Murbury*, 91 U. S. 587; *Holt v. Bennett*, 148 Mass. 43; *McMurtry v. Montgomery etc. Co.* 84 Ky. 462; *Santa Cruz R. R. Co. v. Spreckles*, 65 Cal. 193.

4 *McMurtry v. Montgomery etc. Co.* 84 Ky. 462.

5 *Saltmarsh v. Spaulding*, 147 Mass. 294; 4 R'y & Corp. Law J. 151; *Holt v. Bennett* (1888), 148 Mass. 437.

6 *Holt v. Bennett*, 148 Mass. 437.

7 *Hill v. Nisbet*, 100 Ind. 341.

8 8 Vict. ch. 16, §§ 85, 86.

9 *Poster v. Oxford etc. Ry Co.*, 13 Com. B. 200; 8, C. 22 Law J. Com. B. 99; 8, C. 17 Jur. 167; *Brown & Theobald's Railway Law*, 102.

10 *Bennett v. St. Louis Car Roofing Co.* 15 Mo. App. 343. Cf. *Reilly v. Ogilobay*, 25 W. Va. 36, a case in which, the corporation having no directors, the stockholders acted in that capacity, and a sale of property of a stockholder ordered at a meeting from which some of the stockholders were absent, was held voidable, although a reasonable price had been paid.

§ 478. *Of loans made by the directors to the corporation.*—Directors may lend money to the corporation only upon terms as favorable as the most favorable upon which it could borrow from others, and only when they honestly believe it to be for the interest of the company to borrow.* A director of a corporation, on a mortgage taken as security for notes given him by the corporation on money advanced by him, cannot recover excessive interest stipulated for, nor an amount included therein beyond the sum which he advanced.* A director who has lent money to his company may take its property as security, and upon failure to pay, he may buy it in at a public foreclosure sale;† and this is true whether the pledge be taken for a present or precedent debt.‡ But although a director may become a creditor of his corporation and take and foreclose a mortgage upon its property; yet he must act with the utmost good faith toward the corporation throughout the transaction. He cannot divest himself of the duty which he owes to the corporation as its director.§ In case of the insolvency of a corporation, there is no power in its directors or officers to mortgage or convey the corporate property to themselves, or to secure to themselves a preference.¶ An assignee of a claim held by a director against his company, has no superior utilities to those of the director himself.¶

1 *Twiss Lick Oil Co. v. Marbury*, 91 U. S. 597; *Sutter St. R. R. Co. v. Baum*, 63 Cal. 44; *Campbell's Case*, 4 Oh. Div. 470.

2 *Harts v. Brown*, 77 Ill. 236.

3 *Sutter St. R. R. Co. v. Baum*, 63 Cal. 44.

4 *Twiss Lick Oil Co. v. Marbury*, 91 U. S. 587; *Duncomb v. New York etc. R. R. Co.* 83 N. Y. 1, S. C. 84 N. Y. 190, where the security taken was the bonds of the company at ten cents on the dollar. *Saltmarsh v. S. Building* (Mass. 1883), 4 Ry. & Corp. Law J. 151, 153.

5 *Duncomb v. New York etc. R. R. Co.* 84 N. Y. 190, 192; S. C. 83 N. Y. 1.

6 *Hallam v. Indianapolis Hotel Co.* 56 Iowa, 178; S. C. Am. Law Reg. July, 1882, and note by Adelbert Hamilton.

7 *Haywood v. Lincoln Lumber Co.* 64 Wis. 639.

8 *Hunting v. Sweet*, 33 Kan. 244.

§ 479. **Of secret profits by directors in dealings with the corporation.**—For all secret profits in any dealing between a director and the corporation, he must account to the corporation, although it may have profited by the transaction.¹ He cannot sell property to the corporation at an advance upon the price paid by him, where he has purchased it with that end in view, and nothing has been done in the meanwhile to enhance the value of the property.² For fraud is presumed as a matter of law if it be shown that the director has acquired secret profits in any dealing with the company.³ As a general rule, directors and officers cannot buy up claims against it at a discount, and then prove them at their face value on the winding up of the company;⁴ and for all profits so realized they will be held accountable to the corporate creditors and shareholders.⁵ But a director may enforce a claim against his company which he has purchased from another, provided he seek to derive no secret profit.⁶ A director who buys the bonds of his company below par does so at the peril of their avoidance by the courts at the suit of the corporation.⁷ So

Welch, 24 Minn. 292; *Davis v. Rock Creek etc. Co.* 55 Cal. 399; 36 Am. Rep. 41. *Cf. Palmer v. Nassau Bank*, 73 Ill. 399.

2 *European etc. R. R. Co. v. Poor*, 59 Ma. 277; *Blair Town L&C Co. v. Walker*, 50 Iowa, 376; *Taylor on Corporations* (2d ed. 1889), § 612.

3 *Curtis v. Le-vitt*, 15 N. Y. 10, 44; *Little Rock etc. R'y Co. v. Page*, 26 Ark. 304; *Stewart v. Lehigh Valley R. R. Co.* 31 N. J. 505; *Egan v. Leavenworth etc. R. R. Co.* 21 Kan. 365; *Hugh on Receivers*, §§ 316, 615.

4 *Buffalo etc. R. R. Co. v. Lampson*, 47 Barb. 533; *Greenfield Savings Bank v. Simons*, 133 Mass. 415; *Parker v. Nickerson*, 112 Mass. 16; *Parker v. McKenna*, Law R. 10 Ch. 96; *Madrid Bank v. Pelly*, Law R. 1 Eq. 442; *Gaskill v. Chambers*, 26 Beav. 360; *York etc. R'y Co. v. Hulme*, 16 Beav. 463.

5 *Fitzgran v. Great Western R'y Co.* 7 Eq. 116. See *Aberdeen R'y Co. v. Blair*, 1 Macq. 451; *Brown & Theobald's Railway Law*, 102.

6 *Great Luxembourg R'y Co. v. Magnay*, 25 Beav. 586; *Taylor on Corporations* (2d ed. 1889), § 631.

7 *Thorn Lick Oil Co. v. Marbury*, 91 U. S. 537; *Stewart v. Lehigh Valley R. R. Co.* 38 N. J. 528.

§ 481. Directors to be restored to their original positions when the transaction is set aside. Transactions between a corporation and its directors which are attacked upon the ground of fraud on the part of the directors, actual or constructive, cannot be set aside unless the directors be restored to their original position. Thus it is held, in a recent case, that a transaction by which a trustee acquires the trust property is not void, but merely voidable upon reimbursement of the sum paid by him; and that hence the execution creditors of a railway company, which has suspended operations, cannot avoid a purchase of part of the construction material by the directors, and under execution against the company deprive them of their possession.¹ So also, a fraudulent purchase of corporate property by a director at a foreclosure sale, can be set aside only upon repayment of the purchase price.² In another late case, where directors, by oral agreement with their corporation, had advanced money to redeem corporate property from execution, and taken the assignment

f the certificate and marshal's deed in their own names to secure their advances as a preferred debt of the corporation, and had thereafter taken possession and worked the property, it was decided that the advances should be regarded as a debt due the directors, and the marshal's deed as a mortgage imposing a constructive trust on the directors, who should, however, be allowed the value of such of the improvements made by them as had increased the value of the property, in addition to the actual working expenses incurred.³

1 *Cornell v. Clark*, 104 N. Y. 451.

2 *Saltmarsh v. Spaulding*, 147 Mass. 224; 4 B'y & Corp. Law J. 151.

3 *Wasatch etc. Co. v. Jennings* (Utah, 1888), 16 Pac. Rep. 390.

§ 482. Of the president.—In New York, the presidents of railway companies are elected by the directors from their own number.¹ In the absence of anything in the act of incorporation bestowing special power on the president, he has from his mere official station no more control over the corporate property and funds than any other director.² The president has by virtue of his office but little authority to bind the corporation except upon such contracts as come plainly within its ordinary routine business.³ He has no authority merely by virtue of his office to let a contract for the construction of the road.⁴ He cannot authorize a director to sell the bonds of the company;⁵ nor appoint an agent to sell its lands;⁶ nor can he himself purchase or sell lands in behalf of the company.⁷ Although of course, under authority from the directors, the president may convey the property of the company.⁸ He cannot, without express authority, mort-

gage the property of the company.⁹ Not even where a person owns nearly all the stock of a company, and is its president, superintendent and general manager, can he in that capacity mortgage the corporate property.¹⁰

1 N. Y. Laws of 1850, ch. 140, § 6.

2 *Titus v. Cairo etc. R. R. Co.* 37 N. J. 98, 102; *Walworth County Bank v. Farmers' Loan & Trust Co.* 14 Wis. 325. *Contra, Smith v. Smith*, 12 Ill. 43, 496.

3 *Taylor on Corporations*, § 235; *Risley v. Indianapolis etc. R. R. Co.* 1 Hun. 202; *Hodges v. Rutland etc. R. R. Co.* 29 Vt. 220.

4 *Griffith v. Chicago etc. R. R. Co.* 74 Iowa, 55.

5 *Titus v. Cairo etc. R. R. Co.* 37 N. J. 98.

6 *Chicago etc. R. R. Co. v. James*, 23 Wis. 194.

7 *Bliss v. Kaweah Canal Co.* 65 Cal. 502.

8 *State v. Glenn*, 18 Nev. 34.

9 *Leese v. Isthmus Transit R'y Co.* 6 Or. 125; 25 Am. Rep. 506.

10 *Stow v. Wisc.*, 1 Conn. 214; 18 Am. Dec. 99; *Chicago & N. W. R. R. Co. v. Jones*, 24 Wis. 368.

§ 483. The same subject, continued.—The authority of the president may, however, be enlarged by custom,¹ and without express authority he may do any acts necessarily incident to others which he has been authorized to perform.² Under authority to contract for the corporation and to buy and sell material, it has been held that the president and superintendent may release a purchaser who has become unable to meet his payments, and may substitute in place of him a third party.³ The president of a large corporation likely to be involved in law-suits, may defend prosecutions against it, may petition for a writ of error, and may engage or discharge counsel, in the absence of any restraining acts on the part of the directors, and when his duties are not defined by the constitution and by-laws of the corporation.⁴ But it is not within the power of a president of a

corporation *ex officio* to execute a bond and warrant of attorney for the entering of a judgment against the corporation.¹ There is nothing to prevent the president of a corporation from acting as its secretary also at a meeting of its board of trustees.² When the president dies, his place may be taken by the vice-president, although the office of vice-president was created by the directors merely under a general provision in the by-laws empowering them to create other officers.³

1 *Western R. R. Co. v. Bayne*, 11 Han, 186; *Northern Central R'y Co. v. Bastian*, 15 Md. 494.

2 *Northern Central R'y Co. v. Bastian*, 15 Md. 494.

3 *Indianapolis Rolling Mill Co. v. St. Louis etc. R. R. Co.* 26 Fed. Rep. 140.

4 *Coleman v. West Virginia Oil etc. Co.* 25 W. Va. 142.

5 *Stokes v. New Jersey Pottery Co.* 46 N. J. 237.

6 *Budd v. Walls Walls etc. Co.* 2 Wash. 317.

7 *Coleman v. West Virginia Oil etc. Co.* 25 W. Va. 142.

§ 484. Of the compensation of directors and the president.—Directors are not ordinarily entitled to compensation for their services either by way of salary or a *quantum meruit*, unless by special provision in the charter or by-laws adopted before the rendition of the services. A subsequent vote to pay therefor would be without consideration;¹ and, of course, the board of directors cannot legally vote to pay themselves anything by way of compensation.² Neither can a president of a company recover for his services except under the same circumstances and conditions as an ordinary director.³ But a president or the directors of a company may recover a *quantum meruit* for services rendered the corporation outside of the regular line of their employment;⁴ although, in a late case in New

York, it was held that a director, who receives a salary as vice-president, cannot, in the absence of a special agreement, recover compensation for services outside of his duties as director and vice-president.¹ In another recent case in New York, where the president of a company had served for years, without salary, and had also advanced the company considerable sums of money, which had not been repaid him, it was held to be within the power of the directors to issue to him the shares of the company by way of payment for his services and in repayment of the advances.²

1 *Leam Assoc. v. Stonemasters*, 20 Pa. St. 304; *Maux Ferry etc. Co. v. Bransgton*, 40 Ind. 361; *Illinois Lumber Co. v. Hough*, 91 Ill. 63; *American Central R. Co. v. Miles*, 88 Ill. 174; *Lafayette etc. Ry. Co. v. Chesney*, 7 Ill. 446; B. C. 68 Ill. 670; *Citizens' National Bank v. Elliott*, 58 Iowa, 191. See *Carr v. Chartiers Coal Co.* 25 Pa. St. 337. Cf. cases cited *infra*, n. 1 and *Barstow v. City R. R. Co.* 42 Cal. 465.

2 *Betts v. Wood*, 37 N. Y. 317; *Blanchford v. Ross*, 54 Barb. 49; *Gedner v. Butler*, 30 N. J. Eq. 703, 721; *Maux Ferry etc. Co. v. Bransgton*, 40 Ind. 361; *State v. People's etc. Assoc.* 42 Ohio St. 379. Cf. *Kelsey v. Sargent*, 48 Hun, 158, where it was held that corporate officers have no authority to determine upon their own salaries.

3 *Santa Clara Manuf. Assoc. v. Meredith*, 49 Md. 389; 33 Am. Rep. 284; *Sawyer v. Pawners' Bank*, 6 Allen, 307; *Holland v. Lewiston Falls Bank*, 62 Me. 644; *Kilpatrick v. Penrose etc. Co.* 40 Pa. St. 116; 80 Am. Dec. 497; *Merrick v. Peru Coal Co.* 61 Ill. 472; *Gridley v. Lafayette etc. Ry. Co.* 71 Ill. 300; *Emporium Real Estate Co. v. Emble*, 54 Ill. 343; *Quinn's National Bank v. Elliott*, 58 Iowa, 194; 39 Am. Rep. 187; *Taylor on Corporations*, § 647.

4 *Jackson v. New York Central R. R. Co.* 2 Thomp. & C. 653; *Shackelford v. New Orleans etc. R. R. Co.* 37 Miss. 202; *New Orleans etc. Packet Co. v. Brown*, 36 La. An. 138; 51 Am. Rep. 5; *Santa Clara Manuf. Assoc. v. Meredith*, 49 Md. 389; 33 Am. Rep. 284; *Gardner v. Butler*, 30 N. J. Eq. 703, 721; *Carr v. Chartiers etc. R. R. Co.* 25 Pa. St. 337; 18 Am. Rep. 347; *B. C. 68 Ill. 670*; *Lafayette etc. Ry. Co. v. Chesney*, 7 Ill. 446; 39 Am. Rep. 587; *Citizens' National Bank v. Elliott*, 58 Iowa, 194; 39 Am. Rep. 187; *Rogers v. Historic Ry. Co.* 22 Minn. 25; *Missouri River R. R. Co. v. Richards*, 8 Kan. 111; *Central Lumber v. Shreveport City R. R. Co.* 37 La. An. 841; *Pow v. Gloucester National Bank*, 130 Mass. 391.

5 *Gill v. New York Cab Co.* (1888), 1 N. Y. 302.

6 *Reed v. Hapt* (N. Y. 1888), 4 Ry. & Corp. Law J. 126, affirming N. C. 61 N. Y. Super. Ct. 121.

§ 485. Of the compensation of other officers and agents.—Officers and agents of a corporation,



ther than the president, vice-president and directors, are ordinarily entitled to compensation for their services;¹ and, in the absence of any previous agreement with the corporation with respect to the amount of compensation, they may recover upon a *quantum meruit*.² The act of the managing officer of a railway company in ordering the payment in part of a claim by one of its officers for salary for services rendered, is an admission of liability as against the company.³ But evidence of a resolution of the board of directors that the salary of an officer as during the preceding year fixed at a certain amount, does not show a contract for a salary prior to that time.⁴ In a late action against a railway company on a note given in return for services rendered, it was held no defense thereto that in the execution of the note all the requirements of the by-laws had not been strictly complied with, as recovery ought not to be defeated by matter of mere form and not of substance.⁵

1 See cases cited in the following note. *Cf.* *St. Louis etc. R. R. Co. v. Tiernan*, 37 Kan. 606. But see *Holder v. Lafayette etc. R'y Co.* 71 Ill. 106, 44 Am. Rep. 89, and *Kilpatrick v. Pennock Ferry Bridge Co.* 49 Pa. St. 118, 4 Am. Dec. 497, where it was said that a treasurer cannot claim compensation.

2 *Smith v. Long Island R. R. Co.* 102 N. Y. 190; *Hall v. Vermont etc. R. Co.* 28 Vt. 404; *Low v. Connecticut etc. R. R. Co.* 45 N. H. 370; *Chinatti etc. R. R. Co. v. Clarkson*, 7 Ind. 593; *First National Bank v. Drake*, Kan. 311; 44 Am. Rep. 646; *Bee v. San Francisco etc. R. R. Co.* 46 Cal. 305; *Hill v. Darenth Valley R'y Co.* 26 Law J. Ex. 81; S. C. 1 Hurl. & 305.

3 *St. Louis etc. R. R. Co. v. Tiernan*, 37 Kan. 606.

4 *Smith v. Woodville Mining Co.* 66 Cal. 398.

5 *St. Louis etc. R. R. Co. v. Tiernan*, 37 Kan. 606.

§ 486. The degree of diligence required of directors, officers and agents.—Directors acting in good faith within the limits of their powers, using proper prudence and diligence, are not responsible for

were mistakes or errors of judgment, such as men of ordinary prudence would not have committed;¹ for, as they receive no salary, they cannot be expected to devote all their time to the duties of their office.² But salaried officers and agents are held to a higher degree of diligence in the performance of their duties than are directors.³ It appears to be clear that directors are not liable for a misrepresentation, or a mistake in point of law.⁴ Supine and gross negligence, however, on their part may amount to a breach of trust.⁵ Whether a particular act of the directors is under the circumstances performed with ordinary prudence, skill and care, or whether it be rash and imprudent, is for the jury to determine.⁶

1 *Hunt v. Cory*, 33 N. Y. 65, 70; 37 Am. Rep. 548; *Escalator Petroleum Co. v. Lacey*, 63 N. Y. 422; *Vance v. Phoenix Ins. Co.* 4 La. (Twcn), 396; *Godbold v. Branch Bank of Mobile*, 11 Ala. 191; 48 Am. Dec. 211; *Citizens' Building Assoc. v. Cortel*, 34 N. J. Eq. 383; *Spring's Appeal*, 71 Pa. 84, 11; 10 Am. Rep. 684; *Charitable Corporation v. Sutton*, 2 Atk. 400.

2 *Perry v. Willenden*, 3 Mark. N. S. (La.) 68; 8 C. 6 Martin N. S. 616; 17 Am. Dec. 136.

3 *Commercial Bank v. Ten Eyck*, 48 N. Y. 386; *Austin v. Daniels* 4 Denio, 291; *East New York etc. R. R. Co. v. Elmore*, 5 Hun, 214; *Corcord R. R. Co. v. Clough*, 49 N. H. 257; *Pangborn v. Citizens' Building Assoc.* 33 N. J. Eq. 341; *First National Bank v. Reed*, 36 Mich. 363; *Taylor on Corporations* (2nd ed. 1889), § 618. Cf. *Taylor v. Taylor*, 14 Mo. 522.

4 *Brown v. Theobald's Railway Law*, 110.

5 *Charitable Corporation v. Sutton*, 2 Atk. 400.

6 *Hunt v. Cory*, 33 N. Y. 65; 37 Am. Rep. 548. Cf. *Van Dyck v. McQuade*, 86 N. Y. 34. See also *Scott v. De Puyser*, 1 Edw. Ch. 513; *Litchfield v. White*, 2 Sand. 545; *Spring's Appeal*, 71 Pa. 84, 11; 10 Am. Rep. 684; *Liquidators etc. v. Douglas*, 11 Scot. Cas. (3d series) 112.

§ 457. Directors not personally liable on contracts within their power to make.—Directors are not liable at common law upon any contract lawfully entered into by them in their official capacity on behalf of the corporation,¹ unless it be apparent upon the face of the contract that they in-

tended to assume personal liability;³ so that the liability of directors upon contracts within their powers resolves itself into a matter of intention.³ Declaring the common law on this point, the English Companies' Clauses Act of 1845 enacts that no director, by being party to or executing in his capacity of director any contract or other instrument on behalf of the company, or otherwise lawfully executing any of the powers given to the directors, shall be subject to be sued or prosecuted, either individually, or collectively, by any person whomsoever, and the bodies or goods or lands of the directors shall not be liable to execution of any legal process by reason of any contract or other instrument so entered into, signed, or executed by them, or by reason of any other lawful act done by them in the execution of any of their powers as directors.⁴ There are statutes in some of the American States, however, which subject the directors to personal liability for the debts of the corporation by way of penalty for failure to make annual reports.⁵ To subject the directors of a corporation to liability joint and several for the corporate debts for the preceding year, upon a neglect on their part to file the report of debts and capital, as prescribed by statute, it is held that the complaint must allege that the company was transacting business in the county where it is claimed that the report should have been filed, and must state the contract of indebtedness, which is sued upon, as well as set forth the default of the company and the fact that the parties sued are directors so as to be liable, since the corporation



is, by the terms of the statute, charged with no such duty unless these facts exist.⁶

1 *Rochester v. Barnes*, 26 Barb. 657; *Roberts v. Button*, 14 Vt. 195; *Beattie v. Ebury*, Law R. 7 H. L. 102; *Lindus v. Melrose*, 3 Hurl. & N. 177. C/. *Knomer v. Haines*, 31 Fed. Rep. 513.

2 *Serrell v. Derbyshire etc R'y Co.* 19 Law J. Com P. N. S. 371; S. C. 9 Com. B. 811; *Healy v. Story*, 3 Ex. 3.

3 *Burrell v. Jones*, 3 Barn. & Ald. 47; *Tyrrell v. Woolley*, 1 Man. & G. 809. C/. *Holt v. Winfield Bank*, 25 Fed. Rep. 812.

4 8 Vict. ch. 16, § 100.

5 *Cook v. Pearce*, 23 S. C. 239; *Child v. Boston etc. Works*, 137 Mass. 516; 50 Am. Rep. 328; *Aufenger v. Anzeiger Publishing Co.* 9 Colo. 377; Colo. Gen. Stat. 184, § 16.

6 *Aufenger v. Anzeiger Publishing Co.* 9 Colo. 377.

§ 488. Indemnification of directors.—As agents and trustees the directors are entitled to be indemnified by the company for all losses and expenses in good faith sustained and incurred by them in the exercise of the trust imposed on them.¹ This rule has been reduced to statutory form in England, where the Companies' Clauses Act of 1845 provides that the directors, their heirs, executors and administrators, shall be indemnified out of the capital of the company for all payments made or liability incurred in respect of any acts done by them, and for all losses, costs and damages which they may incur in the execution of the powers granted to them; and the directors for the time being of the company may apply the existing funds and capital of the company for the purposes of such indemnity, and may, if necessary for that purpose, make calls of the capital remaining unpaid, if any.² But directors and agents are not entitled to any indemnity from the corporation in respect of unauthorized expenditures.³ And in many cases a director cannot even make unconditional and unrestrained use of legal

remedies against his company which might be open to outside creditors.⁴

1 2 Lindley on Partnership, 760; In re Court Grange Manuf. Co. 2 Jur. N. S. 494.

2 8 Vict. ch. 16, § 100.

3 In re National Building Soc. Law R. 5 Ch. 309; In re Worcester Corn Exchange Co. 3 De Gex, M. & G. 180; Ex parte Cropper, 1 De Gex, M. & G. 147. Cf. 2 Lindley on Partnership, 765. *Contra*, *Ex parte Chippendale*, 4 De Gex, M. & G. 19, followed by Hoare's Case, 30 Beav. 225; Troup's Case, 29 Beav. 353; Ex parte Bignold, 22 Beav. 143; Baker's Case, 1 Drew & S. 54.

4 Taylor on Corporations (2nd ed. 1889), § 634; Hallam v. Indianapolis Hotel Co. 56 Iowa, 178.

§ 489. **Liability of directors upon contracts beyond their own and the corporate powers.**—If a contract be made by directors in excess of their powers, their liability depends upon whether or no it be of such a nature as may be ratified by the shareholders—that is to say, although the contract be beyond the power of the directors, but not beyond the corporate powers, they cannot be held individually liable to the other contracting party.¹ But directors incur a personal liability upon all contracts entered into by them which are beyond the powers of the corporation.² The fact that they acted in good faith is no defense to an action against them for damages resulting from *ultra vires* acts,³ except where there is doubt as to the limits of their authority;⁴ as where the charter of a company is a complicated one, made up by comparing sixteen acts of incorporation or supplements.⁵

1 Davidson v. Tulloch, 3 Macq. 783. Cf. Davis v. Memphis City R'y Co. 22 Fed. Rep. 883.

2 Roberts v. Button, 14 Vt. 195; Owen v. Van Uster, 10 Com. B. 318. Cf. Holt v. Winfield Bank, 25 Fed. Rep. 812.

3 Van Dyck v. McQuade, 45 N. Y. Super. Ct. 620; Lester v. Howard Bank, 33 Md. 558; 3 Am. Rep. 211; Ex parte Wilson, Law R. 8 Ch. 45;

Hodgkinson v. National etc. Ins. Co. 26 Beav. 473; *Williams v. Paine* 2 Beav. 654; 2 Lindley on Partnership, 692, 794.

4 *Hodges v. New England Screw Co.* 1 R. I. 317; 8 Q. B. 12; 31 Am. Dec. 624; *Spring's Appeal*, 71 Pa. St. 11; 10 Am. Rep. 684.

5 *Spring's Appeal*, 71 Pa. St. 11; 10 Am. Rep. 684.

§ 490. The same subject, continued.—Upon debts beyond the charter or statutory limit.—The directors of a corporation may be held individually liable in a court of equity for debts contracted by them for the company in excess of its limit of indebtedness; and the remedy against them exists independently of statute.¹ In New York, by statute, every officer, agent or stockholder of a company who knowingly assents to, or has any agency in contracting or incurring any debt in excess of the limit of indebtedness prescribed by the statute, is held personally and individually liable to pay such debt; and also liable to arrest and imprisonment in any action for the same, and on any execution issued on any judgment obtained thereon, in the same manner as defendants in actions of trespass are liable, and is also deemed guilty of a misdemeanor.² An action arising under a similar act survives the directors and may be brought against their administrators.³ A statutory liability imposed on the directors for any excess of the debts of the corporation over its capital stock, does not embrace debts due to the directors personally.⁴ An assent on the part of a trustee to contracting a debt in excess of the capital stock of a corporation is not implied by his neglect to enter his protest against it upon being informed thereof after it has been incurred.⁵ Neither can an assent be implied on the part of those trustees who are never present at the meetings, are never conferred with, and never take

a more active part in the administration of the trust than to affix their signatures to the yearly reports.⁶ A party, holding himself out as trustee may be liable, even though it appear that he was never duly chosen, and that he owned no stock in the corporation.⁷

1 Stone v. Chisolm, 113 U. S. 302.

2 N. Y. Laws of 1845, ch. 230, § 1.

3 McComb v. Kellogg (1888), 1 N. Y. Suppl. 206, construing N. Y. Laws of 1848, ch. 40, § 23.

4 McClave v. Thompson, 36 Hun, 365.

5 Patterson v. Robinson, 36 Hun, 622.

6 Patterson v. Robinson, 36 Hun, 622.

7 Halstead v. Dodge, 51 N. Y. Super. Ct. 169.

§ 491. **Liability of directors, officers and agents for fraudulent and illegal acts.**—The directors, officers and agents of a corporation are liable to persons injured by their fraud and illegal acts.¹ Thus, the president of a company, which is a common carrier of persons, is personally liable for the ejection and injury of persons, whom he has ordered to be excluded, as a class, from carriage, even though an action might lie against the company also.² Directors are individually responsible for intentionally issuing spurious stock and securing loans thereon. It is not necessary to bring an action first against the corporation, and the existence of the corporation does not come into issue.³ The directors of a corporation, who have placed in the hands of an agent, for sale, bonds indorsed falsely and intentionally, "first mortgage bonds," are answerable to *bona-fide* purchasers who have been injured by relying on such indorsement.⁴ It is proper for a suit to be instituted against the general manager of a corporation, for a violation by it of an ordi-

nance requiring it to pay a license tax before it can transact business.¹ The directors, officers and agents are liable for their fraudulent and illegal acts to the corporation also, and to its stockholders,² and they are liable to the creditors of the corporation, where their wrongful acts have resulted in diminishing the fund to which the latter have a right to look for the payment of their claims.³

1 *Bols v. Bidder*, 12 Daly, 289; *Clark v. Edgar*, 84 Mo. 106; 54 Am. Rep. 84; *Exchange Bank v. Sibbey*, 71 Ga. 726; *Peck v. Cooper*, 112 Ill. 12; 61 Am. Rep. 231; *Robinson v. Smith*, 3 Paige Ch. 287; 24 Am. Dec. 27; *Salmon v. Richardson*, 30 Conn. 380; 79 Am. Dec. 226; *Hodges v. New England Serris Co.* 1 R. I. 312; 53 Am. Dec. 624; *Wyandotte v. Corrigan*, 3 Kan. 21; *Peck v. Gurney*, Law R. 6 H. L. 277.

2 *Peck v. Cooper*, 112 Ill. 12; 54 Am. Rep. 231.

3 *Exchange Bank v. Sibbey*, 71 Ga. 726.

4 *Clark v. Edgar*, 84 Mo. 106; 54 Am. Rep. 84.

5 *Wyandotte v. Corrigan*, 3 Kan. 21.

6 *United Soc. v. Underwood*, 9 Bush, 608; 15 Am. Rep. 721; *Amherst v. Goldthwaite*, 34 Tex. 125; *Harvans v. Davidson*, 18 Gratt. 229; 30 Am. Dec. 602; *Bedford R. R. Co. v. Bowser*, 48 Pa. St. 20; *Chilman v. Biddle Assoc. v. Coriell*, 34 N. J. Eq. 288; *Williams v. Riley*, 34 N. J. Eq. 28; *Oakland Bank v. Wilson*, 30 Cal. 125; *Taylor on Corporations*, § 614.

7 *Penobscot etc. R. R. Co. v. Dunn*, 39 Mo. 267; *Bedford R. R. Co. v. Bowser*, 48 Pa. St. 20.

§ 492. Liability of directors for the misfeasance of their appointees.—Ordinarily directors are not liable for the misfeasance of officers and agents appointed and selected by them with due care, which in no way results from any omission of duty on their part,¹ unless they have expressly or tacitly authorized the wrong-doing.² Thus, where directors authorized brokers to issue a prospectus for the purpose of borrowing on debentures, and the brokers issued a prospectus containing fraudulent statements, a director who was abroad at the time the prospectus was issued, and knew nothing of its contents, was held not liable.³ So, also, it has been held that directors re-electing a

secretary without requiring a renewal of his bond, supposing that the one originally given to secure the faithful performance of his duties was a continuing security, are not liable to make good the loss occasioned by his defalcation where they acted in good faith.⁴ The law, however, on this point is, perhaps, open to reconsideration, and it may be doubted whether the better opinion is not that a director who delegates his duty to another person is bound to see that no fraud is committed in carrying out the duty; so that, for instance, a director who authorizes brokers to issue a prospectus would be liable for a fraudulent statement contained therein.⁵ Accordingly, it is held that the directors are chargeable with notice of all important matters done by their committeemen.⁶ In England it is required by statute that before any person intrusted with the custody or control of moneys, whether treasurer, collector, or other officer of the company, shall enter upon his office, the directors shall take sufficient security from him for the faithful execution of his office.⁷

1 *Batchelor v. Planters' National Bank*, 78 Ky. 438, 446; *Hewitt v. Swift*, 3 Allen, 420; *Batchelor v. Pinkham*, 68 Me. 253; *Bath v. Caton*, 37 Mich. 199; *Nicholson v. Mounsey*, 15 East, 384; *Stone v. Cartright*, 5 Tenn. Rep. 411. *Of Weir v. Barnett*, 3 Ex. Div. 238.

2 *Cargill v. Bower*, 10 Oh. Div. 502; *Weir v. Barnett*, 3 Ex. Div. 22; *Weir v. Bell*, 3 Ex. Div. 238.

3 *Weir v. Bell*, 3 Ex. Div. 238; *Browne & Theobald's Railway Law*, 110.

4 *Vance v. Phoenix Ins. Co.* 4 Lea, 365.

5 *Browne & Theobald's Railway Law*, 110, citing *Weir v. Bell*, 3 Ex. Div. 238, judgment of *COTTON, L. J.*, and *Peck v. Gurney* (*Barclay's Case*), Law R. 6. H. L. 377, p. 392.

6 *Hun v. Cory*, 23 N. Y. 65; 37 Am. Rep. 545. See also *Smith v. Prattville Manuf. Co.* 29 Ala. 503; *Henry v. Jackson*, 37 Vt. 431; *Neall v. Hill*, 16 Cal. 145, 151.

7 8 Vict. ch. 10, § 109.

§ 498. Of the joint and several liability of directors.—A director is not liable for the breaches

of trust or fraudulent or illegal acts of his co-directors which he has neither expressly nor tacitly sanctioned,¹ nor for those wrongful acts of which he had no knowledge.² But this is doubted by an eminent authority, upon the ground that it may be the duty of a director to acquaint himself with the doings of his co-directors.³ But however this may be, it is certain that those who know of and sanction a breach of trust, although not actively taking part therein, are equally liable,⁴ as also are those who know of the breach of trust, but who take no steps to prevent it beyond writing a letter of disapproval.⁵ And of course it follows that all those directors who are actually implicated in a breach of trust in misapplying the corporate funds are jointly and severally liable therefor, although they only sign checks prepared by others.⁶ But directors failing to account for profits improperly received by them, are only severally liable each for his own receipts.⁷ In that case, to affect them with joint liability, it must be shown that they acted jointly as a board.⁸

1 *Cargill v. Bower*, 10 Ch. Div. 502; *Weir v. Barnett*, 3 Ex. Div. 22.

2 *Ashurst v. Mason*, Law R. 20 Eq. 225; *In re Montrotier Asphalt Co.* 24 Law T. N. S. 718.

3 *Lindley on Partnership*, 596.

4 *Land Credit Co. v. Fernoy*, Law R. 5 Ch. 763; 2 *Lindley on Partnership*, 535.

5 2 *Lindley on Partnership*, 595, citing *Joint Stock Discount Co. v. Brown*, Law R. 8 Eq. 381.

6 2 *Lindley on Partnership*, 596; *Land Credit Co. v. Fernoy*, Law R. 5 Ch. 763.

7 *Parker v. McKenna*, Law R. 10 Ch. 95; *General Exchange Bank v. Horner*, Law R. 9 Eq. 180.

8 *Franklin Ins. Co. v. Jenkins*, 3 Wend. 130.

**§ 494. Of contribution between directors joint-
ly liable.** — Where the directors of a corporation be

some liable upon a contract entered into by the corporation, and any of them are required to assume more than their proper proportion of the liability, they are entitled to contribution from the others.¹ But with respect to liability arising out of tort, the rule is different. The right of contribution then depends upon the innocence of those of them who have been held liable therefor. There is no right of contribution between those that are equally guilty, although one of them may have been compelled to make good the whole loss, for each is liable for the whole.² But if several directors have been held liable for the wrongful acts of another of which they are innocent, they are entitled to contribution from him; and so if one director be made to pay the whole loss arising from a wrongful act of which he is innocent, he is entitled to contribution from the others.³

1 *Slaymaker v. Gundacker*, 10 Serg. & R. 76.

2 *Andrews v. Murray*, 33 Barb. 354. *Contra*, *Nickerson v. Wheeler*, 118 Mass. 296.

3 *Power v. O'Connor*, 19 Week. Rep. 923; *Power v. Hoey*, 19 Week. Rep. 916; *Lewin on Trusts* (5th ed.), 744.

§ 495. Liability of directors under the New York Penal Code.—A director of a stock corporation, who concurs in any vote or act of the directors of that corporation, or any of them, by which it is intended (1) to make a dividend, except from the surplus profits arising from the business of the corporation, and in the cases and manner allowed by law,¹ (2) to divide, withdraw, or in any manner pay to the stockholders, or any of them, any part of the capital stock of the corporation; or to reduce the capital stock without the consent of the

legislature;² (3) to discount, or receive any note or other evidence of debt in payment of an installment of capital stock actually called in, and required to be paid, or with intent to provide the means of making the payment;³ (4) to receive or discount any note or other evidence of debt with intent to enable any stockholder to withdraw any part of the money paid in by him on his stock; (5) to apply any portion of the funds of the corporation, except surplus profits, directly or indirectly, to the purchase of shares of its own stock; (6) to receive any such shares in payment or satisfaction of a debt due to the corporation;⁴ (7) to receive in exchange for the shares, notes, bonds or other evidences of debt of the corporation, shares of the capital stock or notes, bonds or other evidences of debt issued by any other stock corporation, is guilty of a misdemeanor.⁷

1 N. Y. Penal Code, § 594.

2 N. Y. Penal Code, § 594.

3 N. Y. Penal Code, § 594.

4 N. Y. Penal Code, § 594.

5 N. Y. Penal Code, § 594.

6 N. Y. Penal Code, § 594.

7 N. Y. Penal Code, § 594.

§ 496. Liability of directors, officers and agents under the New York Penal Code.—A director, officer or agent of any corporation or joint-stock association, who knowingly receives or possesses himself of any property of that corporation or association, otherwise than in payment of a just demand, and with intent to defraud omits to make, or to cause or direct to be made, a full and true entry thereof, in the books or accounts of the corporation or association; and a director, officer, agent or member of any corporation or joint-stock

association, who, with intent to defraud, destroys, alters, mutilates or falsifies any of the books, papers, writings or securities belonging to the corporation or association, or makes or concurs in making any false entry, or omits or concurs in omitting to make any material entry in any book of accounts or other record or document kept by the corporation or association, is punishable by imprisonment in a State prison not exceeding ten years, and not less than three years, or by imprisonment in a county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.¹

A director, officer, or agent of any corporation or joint-stock association, who knowingly concurs in making or publishing any written report, exhibit, or statement of its affairs or pecuniary condition, containing any material statement which is false, other than such as are elsewhere, by this code, specially made punishable, is guilty of a misdemeanor.² A director of a corporation or joint-stock association must be deemed to have such a knowledge of the affairs of the corporation or association as to enable him to determine whether any act, proceeding, or omission of its directors, is a violation of this chapter.³ A director of a corporation or joint-stock association, although not present at a meeting of the directors, at which any act, proceeding or omission of the directors, in violation of this chapter, occurs, must be deemed to have concurred therein, if the facts constituting such violation appear on the record or minutes of the proceedings of the board of directors, and he remains a director of the company

for six months thereafter, without causing, or in writing requiring, his dissent from such illegality to be entered in the minutes of the directory.⁴ The term "director," as used in this chapter, embraces any of the persons having by law the direction or management of the affairs of a corporation, by whatever name such persons are described in its charter, or are known in law.⁵

1 N. Y. Penal Code, § 602.

4 N. Y. Penal Code, § 611.

2 N. Y. Penal Code, § 603.

5 N. Y. Penal Code, § 614.

3 N. Y. Penal Code, § 609.

§ 497. **Directors and officers prohibited from gambling in the securities of the corporation.** No officer or director of any railroad corporation shall sell, or agree to sell, or be directly or indirectly interested in the sale of, or agreement to sell, any shares of the stock of the corporation of which he is an officer or director, unless at the time of sale, or agreement to sell, he is the actual owner of such shares.¹ Any person violating any of the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment not less than six months, or by a fine not exceeding five thousand dollars, or by both such fine and imprisonment.²

1 N. Y. Laws of 1884, ch. 223, § 1.

2 N. Y. Laws of 1884, ch. 223, § 2.

§ 498. **Of de facto directors, officers and agents.** Ordinarily the power of persons to act in behalf of a corporation, who have become directors *de facto*, cannot be collaterally questioned by a stockholder, but only by a judgment of ouster against them in direct proceeding for that purpose.¹ Thus, a board

of *de facto* directors may bring an action in trespass against another board claiming to be directors *de jure*, and the latter cannot defend by impeaching the title of the former, as this would be doing collaterally what may be done only by direct proceedings under a writ of *quo warranto*.² In England this doctrine has been reduced to statutory form by the Companies' Clauses Act of 1845, which declares that all acts done by any meeting of the directors, or of a committee of directors, or by any persons acting as directors, notwithstanding it may be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were or was disqualified, shall be as valid as if every such person had been duly appointed and was qualified to be a director.³ The doctrine of the validity of the acts of *de facto* officers rests upon public policy and the principles of justice. Their dealings with third persons are sustained as rightful and valid on the ground of continuous acquiescence by the corporation in suffering them to hold themselves out as possessing authority to act for it, and thereby inducing others to deal with them in the capacity of corporate officials.⁴ But stockholders are not third persons in their relation to the corporation, and in dealings between them and usurpers the necessity and justice of the rule as to the validity of the acts of directors does not exist, and the rule itself is inapplicable.⁵ Accordingly, the validity of the acts of directors *de facto* and their authority may be collaterally called in question by a stockholder whenever those acts are destructive or affect his proprietary

rights, or impose a liability on him as such, provided the rights of third parties do not intervene.⁶ To constitute an officer *de facto* there must be a color of election or appointment, or an exercise of the functions of the office under such circumstances and for such a length of time, without interference as to justify the presumption of a due election or appointment.⁷ The mere exercise of the functions of office is not in itself sufficient to establish a title *de facto*. Thus, where the bill alleged only two official acts, "it may well be doubted whether the allegations make a *prima facie* case of directors *de facto*."⁸

1 *Moses v. Tompkins* (1888), 84 Ala. 613.

2 *Atlantic etc. R. R. Co. v. Johnston*, 70 N. C. 342; *Taylor on Corporations* (2nd ed. 1889), § 809.

3 8 Vict. ch. 16, § 99.

4 *Moses v. Tompkins*, 84 Ala. 613.

5 *Moses v. Tompkins*, 84 Ala. 613.

6 *Moses v. Tompkins*, 84 Ala. 613; *Thorington v. Gould*, 88 Ala. 461; *Insurance Co. v. Westcott*, 14 Gray, 440.

7 *Moses v. Tompkins*, 84 Ala. 613; *Cary v. State*, 76 Ala. 78.

8 *Moses v. Tompkins*, 84 Ala. 613.

CHAPTER XX.

UNAUTHORIZED, ULTRA VIRES AND ILLEGAL CONTRACTS.

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I.

§ 499. Definitions of "unauthorized," "*ultra vires*," and "illegal" acts.—The expression, "unauthorized acts," is used to designate those contracts or transactions which a corporation, without exceeding its charter or statutory powers, might have authorized its directors, officers and agents to perform, but which they have entered into without that authority, either express or implied. *Ultra vires* acts are such as are done, either by the stockholders of a company in their corporate capacity, or by the directors, officers and agents, beyond the powers conferred expressly or by implication upon the corporation by its charter or by the general laws of the State.¹ An illegal corporate act is one which, in addition to being *ultra vires*, is also in contravention of some prohibitory statute, or against public policy, or *malum per se*.² While the same act may be both illegal and *ultra vires*, yet there are cases in which the corporation may exceed its charter powers in performing an act

which is neither *malum per se* nor *malum prohibitum*.³

1 *Scottish etc. Ry Co. v. Stewart*, 3 Macq. 322, 418; *South Yorkshire Ry Co. v. Great Northern Ry Co.* 9 Ex. 55, 64; *Taylor v. Chiswater etc. Ry Co.* Law R. 2 Lx. 55, 59, where Justice BLACKBURN says "I think it very unfortunate that the same phrase of '*ultra vires*' has been used to express both an excess of authority as against the shareholders and the doing of an act illegal as being *malum prohibitum*, for the two things are substantially different, and I think the use of the same phrase for both has produced confusion." Cf. *Asbury Railway Carriage etc. Co. v. Richards*, Law R. 7 H. L. 653.

2 *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 68; 20 Am. Rep. 504; *Bissell v. Michigan etc. R. R. Co.* 23 N. Y. 244.

3 *Bissell v. Michigan etc. R. R. Co.* 23 N. Y. 244.

§ 500. Of unauthorized acts of directors, officers and agents.—A corporation is not bound by any act of its directors, officers or agents which has not been authorized either expressly or by implication,¹ unless it be done by them while apparently acting within the scope of their authority.² A company is not liable for the fraud of directors or agents before its incorporation,³ unless the act be ratified,⁴ or acquiesced in by the corporation.⁵ While a corporation will not be held liable on contracts made on its behalf by its promoters, previous to its organization, it may adopt them subsequently thereto just as it may contract anew, and it will be necessary for formal action to be taken by the directors only when it would be required in the making of a like original contract.⁶

1 *Kelley v. Fargent*, 40 Hun, 150; *De Bost v. Albert Palmer Co.* 25 Hun, 336; *Dale v. Donaldson Lumber Co.* 48 Ark. 188; *Moshannan Land etc. Co. v. Sloan* (N. J. 1857); *Mutual Ins. Co. v. McSherry*, 68 Md. 41; *Little v. Kerr*, 44 N. J. Eq. 253; *Rice v. Peninsular Club*, 32 Mich. 87; *Gregory v. Lamb*, 16 Neb. 205.

2 *Eaglesfield v. Marquis of Londonderry*, 4 Ch. Div. 523, where a company was held bound by erroneous representations of fact made by its agents while acting in the scope of their authority. So, also, it would seem the company is liable for fraudulent misrepresentations of an agent while acting within the scope of his authority *Weir v. Bell*, 3 Ex. Div. 236; *Weir v. Barnett*, 3 Ex. Div. 32; *Sev.ers v. Francis*, 3 App. C. 106; *Mackay v. Commercial Bank*, Law R. 5 P. O. 394; *Barwick v. London Joint Stock Bank*, Law R. 2 Ex. 280; *Swift v. Jewsbury*, Law R. 2 Q. B. 331. See

dicta to the contrary in *Western Bank v. Addie*, Law R. 1 H. L. 143. At any rate, when the company has profited thereby: *Browne & Theobald's Railway Law*, 109. But proof must be adduced of bad faith or want of reasonable grounds of belief, before recovery can be had in a suit against a corporation for the deceit or false representations of its agent; *Ever City Iron Works v. Barber*, 105 Pa. St. 125; 51 Am. Rep. 508.

3 *Western Bank v. Addie*, Law R. 1 H. L. 143; *Browne & Theobald's Railway Law*, 109.

4 *Mutual etc. Ins. Co. v. McSherry* (1888), 68 Md. 41. *Cy. Metropolitan etc. Co. v. Domestic etc. Co.* (1886) 43 N. J. Eq. 626.

5 *Vide* *infra*, §§ 504, 505.

6 *Battelle v. Northwestern etc. Pavement Co.* (1887) 37 Minn. 89.

§ 501. The same subject, continued—Implied and incidental powers of agents.—Persons doing business with the officers of a corporation are presumed to know that they have no power to bind the corporation beyond the scope of their authority.¹ A person, in acting at the instance of a director who assumes powers never delegated to him, does so at his own peril and creates no charge against the corporation.² A corporation is not bound by an act of its officers, which virtually amounts to a gratuitous and unnecessary payment of a sum of money.³ An act done by an agent after the expiration of his term of office cannot bind the corporation.⁴ The authority of an agent need not be proven to have been expressly conferred. His authority to act may be implied from his official position or from custom.⁵ Thus, a corporation will be presumed to have authorized its officers to issue its promissory note from its having acquiesced in or recognized their acts in the regular course of its authorized business.⁶ So also a corporation is estopped from denying the power of one, who has passed himself off as its agent, on the ground that he was not duly chosen by the directors, after having confirmed acts done by him.⁷ Or a custom

recognized by the members of a company may supply the place of express authority.¹ And, again, an agent may have implied power to do many things, as necessarily incidental to the powers expressly conferred.² A general agent clothed with authority to pay the corporate debts, may make a novation of a debt due from the corporation.

1 *De Boer v. Albert Palmer Co.* 36 Hun, 394.

2 *Rice v. Pepsinier Club*, 63 Mich. 87.

3 *Kelsey v. Sargent*, 40 Hun, 180.

4 *New York etc. R'y Co. v. Bates*, (Mo. 1898).

5 *Indianapolis Rolling Mill Co. v. St. Louis etc. R. R. Co.* 120 U. S. 396; *Page v. Fall River etc. R. R. Co.* 31 Fed. Rep. 257; *Fifth Ward etc. Bank v. First National Bank*, 48 N. J. 513; *Hannibal Bank v. North Missouri Coal Co.* 86 Mo. 125; *Flynn v. Des Moines etc. R'y Co.* 63 Iowa, 490; *Topeka Primary A. U. B. v. Martin* (1898), 39 Kan. 750.

6 *Hannibal Bank v. North Missouri Coal Co.* 86 Mo. 125.

7 *Flynn v. Des Moines etc. R'y Co.* 63 Iowa, 490.

8 *Page v. Fall River etc. R. R. Co.* 31 Fed. Rep. 257; *Fifth Ward etc. Bank v. First National Bank*, 48 N. J. 513; *Flynn v. Des Moines etc. R'y Co.* 63 Iowa, 490; *Topeka Primary A. U. B. v. Martin* (1898), 39 Kan. 750.

9 *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, 65, *et seq.*, and cases there reviewed, *q. v.* for a general discussion of the scope of authority of corporate agents; *Whitaker v. Kilroy* (Mich. 1898), 4 E'y & Corp. L. J. 197.

10 *Malerone v. American Lumber Co.* 55 Mich. 622.

§ 502. The same subject, continued—Certain acts held not incidental to powers of agents.—But the secretary and treasurer of a corporation has no implied power to release without consideration any of several makers of a note owned by the company;¹ nor is the superintendent and treasurer of a corporation empowered to mortgage its property or to confess judgment against it from the fact that he is in the habit of borrowing money for the use of the corporation;² nor, unless especially authorized, the secretary of a corporation has no power to give a "due-bill" binding on the corporation to a stockholder in return for stock surrendered by him;³ nor are the declarations of a super-

intendent, in acknowledgment of a claim against the company, admissible when no evidence appears to show his authority to bind the company by his admissions, and the authority is expressly denied. In order that the declaration of an officer may be admissible as evidence it must be shown either that he had authority to make the statement, or that he was held out as the proper officer to whom to apply for information, or that he had some duty to perform in the premises.⁵ Declarations of a director as to whether a certain person is the agent of the company, are not sufficient to bind the company.⁶

1 Moshannon etc. Co. v. Sloan (Pa. 1887).

2 Stokes v. New Jersey etc. Co. 46 N. J. 237.

3 Gregory v. Lamb, 16 Neb. 205.

4 Blain v. Pacific Express Co. 63 Tex. 74.

5 Tuthell Spring Co. v. Shaver Wagon Co. (1888), 35 Fed. Rep. 644.

6 Florida etc. R. R. Co. v. Varnedoe (Ga. 1838).

§ 503. The same subject, continued—Acts apparently within the agent's authority.—It is sufficient that the act be apparently within the scope of the agent's authority. But where the authority of the agent depends upon some fact outside of the express terms of his power, and which from its nature rests particularly within his knowledge, the principal is bound by the representation of the agent, although false, as to the existence of such fact.¹ When the general manager of a railroad company retains a practicing attorney to attend to legal business for the company, the company is liable for the services of the attorney, unless the general manager had no authority to make the employment, and the attor-

ney knew, or might have known by using ordinary diligence, that he had no such authority.² In cases of emergency requiring immediate action, it will in some cases be presumed that a servant of the company on the spot has authority to enter into a contract on behalf of the company.³ Thus, a general manager and a police inspector, whose duty it was to proceed to the place of an accident, have been held authorized to bind the company for medical services, hotel expenses, etc., of injured passengers.⁴ A station-master has been held not to have such authority.⁵ Nor has the general manager of a corporation any authority to bind the company by engaging the services of a physician for one of its employees injured in a private quarrel.⁶

1 *Griswold v. Haven*, 25 N. Y. 601; 82 Am. Dec. 380; *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, 63; Story on Agency, 452; Lloyd's Paley on Agency, 494, 301, 307; Bacon Abr. tit. Master and Servant, K.; 2 Kent Com. 620, notes; 1 Blackstone Com. 432.

2 *St. Louis etc. R. R. Co. v. Grove*, 39 Kan. 731.

3 *Browne & Theobald's Railway Law*, 108.

4 *Walker v. Great Western R'y Co.* Law R. 2 Ex. 228; 36 Law J. Ex. 123; *Langan v. Great Western R'y Co.* 30 Law T. N. S. 173; *Browne & Theobald's Railway Law*, 108.

5 *Cox v. Midland Counties R'y Co.* 3 Ex. 268, a case which would probably not now be followed; *Browne & Theobald's Railway Law*, 108.

6 *Dale v. Donaldson etc. Co.* (1887) 48 Ark. 188.

§ 504. Of the ratification of unauthorized acts.

A corporation may ratify any unauthorized act of its agents which it had the power in the first instance to authorize.¹ Thus the shareholders of a corporation may ratify and affirm a lease of its land to its president, made by the president and treasurer without authority.² And taking possession of a leased road in accordance with a lease executed by its officers without due authority, and operating the same, and paying the rent therefor, as reserved,

in the lease, is a sufficient ratification.³ So, the act of the treasurer of a railway company in using the corporate seal on notes will be deemed as ratified by the company, where the notes have been declared genuine by a committee of the directors, where interest has been paid on them, and where reports reciting this fact have been approved.⁴ In a recent action on a contract, entered into on behalf of a corporation by its president, who had no authority so to do, where a ratification of the directors was relied upon, it was held that actual knowledge of the contract and its terms, and acquiescence therein, must be shown on their part, and that it was erroneous to charge the jury that "all directors are presumed to know what it is their duty to know, what they are able to know, and what they undertook to know when they accepted their position," and "that, in the absence of direct and positive evidence of the knowledge of the directors, jurors have the right to assume that they are doing what they were appointed to do, and that they know what they were appointed to know."⁵ A corporation, by alleging that the contract was entered into "with the plaintiff," and by setting forth the contract in terms by which it appeared to have been made by the president in behalf of the corporation, has been held to admit the authority of its president to make the contract.⁶ Where a corporation reserved to its board of directors, by a by-law, power to control the president and superintendent whenever it deemed proper, and the president made a release of a contract and reported it to the board, which took no steps to disaffirm the release until two years after, and about

a year and a half after the institution of suit on the original contract, the disaffirmance was held to be too late.⁷ The ratification of the unauthorized acts of directors, and of such corporate officers as are elected directly by the shareholders, is with the shareholders.⁸ For this purpose a majority vote of the shareholders is sufficient where the act is merely unauthorized, and not *ultra vires* nor illegal.⁹ It is as with the directors to ratify the unauthorized acts of corporate agents appointed by them,¹⁰ or the acts of corporate officers which should not have been done without authority first obtained from the directors.¹¹ And so on down the line, each superior officer or agent may ratify such unauthorized acts of his subordinates as he might in the first instance have given authority to do.¹²

1 Fleckner v. Bank of United States, 8 Wheat. 338, 363; Greenleaf v. Norfolk Southern R. R. Co. 91 N. C. 33; Planters' Bank v. Sharp, 12 Miss. 4 (Smedes & M.) 75; 43 Am. Dec. 470; First National Bank v. Ficks, 75 Mo. 173; 42 Am. Rep. 397; Kelsey v. National Bank, 69 Pa. St. 424.

2 Mount Washington Hotel Co. v. Marsh, 63 N. H. 230.

3 Oregonian R'y Co. v. Oregon R'y etc. Co. 28 Fed. Rep. 505.

4 St. James Parish v. Newburyport R. R. Co. 141 Mass. 500.

5 Murray v. Nelson etc. Co. 143 Mass. 250.

6 St. Paul etc. Co. v. Dayton (1887), 37 Minn. 364.

7 Indianapolis Rolling Mill Co. v. St. Louis etc. R. R. Co. 120 U. S. 256.

8 Payson v. Stoever, 2 Dill. 427; Crum's Appeal, 68 Pa. St. 474. In re New Zealand Banking Co. Law R. 3 Ch. 131; Lane's Case, 1 De Gex, J. & B. 504.

9 See cases cited *supra*.

10 Fleckner v. Bank of United States, 8 Wheat. 338, 368; Scott v. Middletown etc. R. R. Co. 88 N. Y. 200; Lyndeborough Glass Co. v. Massachusetts Glass Co. 111 Mass. 315; Sherman v. Fitch, 98 Mass. 59.

11 Sherman v. Fitch, 98 Mass. 59; Perry v. Simpson etc. Co. 37 Conn. 520; Darst v. Gale, 83 Ill. 136.

12 Pacific R. R. Co. v. Thomas, 19 Kan. 256.

§ 505. Accepting the fruits of the contract a bar to pleading want of authority in the agent.—
A corporation accepting the benefit of a contract

made for it by an unauthorized agent is estopped from pleading his want of authority to act in the transaction.¹ Upon this principle it is expressly provided by statute in New York, that where directors have exceeded their authority in borrowing money for the corporation, the contracts are not to be deemed invalid as against the company by reason thereof.² So, in a recent case in Alabama, it is held that a company retaining the proceeds of a note executed by its president cannot deny his authority to make it.³ In another late case in which a corporation had accepted a deed of land, bought by one of its officers, it was held estopped from denying the authority of the officer to agree to pay a price additional to the consideration set forth in the deed.⁴ In another case a director of a corporation, after proposing a loan to the corporation at a regular meeting of the directors, sought the advice of counsel as to the authority of the corporation to borrow, and a form of bonds was drawn up by the counsel with the knowledge of the corporation, though without his being actually employed by it. The corporation was declared liable for the services of the counsel.⁵ Where the promoters of a corporation, after the signing, but before the filing of articles of incorporation, and before the fixing of a time for the commencement of business, selected a president and authorized him to make a note in payment for certain property, which came duly into the possession of the corporation and was used and enjoyed by it, recovery was allowed an assignee of the note.⁶ But to impute to a corporation liability for services rendered prior to its creation, under an agreement with the pro-

noter thereof, it must be shown that the services resulted to the interest of the corporation, and were performed on the corporate credit rather than on the individual credit of the promoter.⁷

1 *Tuscaloosa etc. Co. v. Perry*, 85 Ala. 158; *Holmes v. Kansas City Board of Trade*, 81 Mo. 137; *Kickland v. Menasha etc. Co.* 68 Wis. 34; *Paxon Cattle Co. v. First National Bank*, 21 Neb. 621; 59 Am. Rep. 832; *Pa. Idling v. London etc. Ry. Co.* 8 Ex. 667; *Beverly v. Lincoln Gas Light etc. Co.* 6 Ad. & E. 320. But see *Williams v. Chester etc. Ry. Co.* 14 Jur. 828.

2 N. Y. Laws of 1845, ch. 230, § 1.

3 *Tuscaloosa etc. Co. v. Perry*, 85 Ala. 158.

4 *Kickland v. Menasha etc. Co.* 68 Wis. 34.

5 *Holmes v. Kansas City Board of Trade*, 81 Mo. 137.

6 *Paxon Cattle Co. v. First National Bank*, 21 Neb. 621; 59 Am. Rep. 832.

7 *Perry v. Little Rock Ry. Co.* 44 Ark. 363.

II.

§ 506. *Of ultra vires acts.*—A corporation has power to perform only such acts as are authorized by its charter and by the general laws of the State, or such as are necessarily incident thereto.¹ In New York, this principle of the common law is reduced to statutory form in the provision that no corporation shall exercise any corporate powers beyond those enumerated in the statute, or in its charter, or in the law under which it is incorporated, except such as shall be necessary to the exercise of the powers so conferred.² There is a similar statute in New Jersey;³ and by the constitutions of Alabama, Louisiana, Missouri, California and Pennsylvania, corporations are prohibited from engaging in any business other than that expressly authorized by their charters or the law under which they are formed.⁴ A corporation is not vested with all the capacities of a natural person, or of an ordinary partnership, but with such only as its

charter confers. If it exceeds its chartered powers, not only may the government take away its charter, but those who have subscribed to its stock may avoid any contract made by it clearly in excess of its powers.¹ If it makes a contract manifestly beyond the powers conferred by its charter, a court of chancery, on the application of a stockholder who has not participated or acquiesced in the act, will restrain the corporation from carrying out the contract.² And under certain circumstances a corporate creditor also may set aside or restrain such an *ultra vires* act. Every person who enters into a contract with a corporation is bound at his peril to take notice of the legal limits of its capacity.³ But the presumption is in favor of the power of the corporation to contract, and where there is no evidence that a corporation has acted without authority or contrary to the terms of its charter, a contract made by it is *prima facie* valid, and will not be set aside as *ultra vires*.⁴

1 *Davis v. Old Colony R. R. Co.* 131 Mass. 253; 41 Am. Rep. 221.

2 N. Y. Rev. Stat. (7th ed.) 1530; *Curtis v. Leavitt*, 15 N. Y. 9; *Halswell v. New York*, 3 N. Y. 433, 433.

3 *Morris etc. R. R. Co. v. Sussex R. R. Co.* 20 N. J. Eq. 342.

4 Stimson's Am. Stat. Law (1886), § 446.

5 *Davis v. Old Colony R. R. Co.* 131 Mass. 253; 41 Am. Rep. 221.

6 *Davis v. Old Colony R. R. Co.* 131 Mass. 253; 41 Am. Rep. 221.

7 Stated *infra*, § 519.

8 *Pearce v. Madison etc. R. R. Co.* 21 How. 441; *Davis v. Old Colony R. R. Co.* 131 Mass. 253; 41 Am. Rep. 221; *Asbury Ry etc. Co. v. E. & N. Ry. Co.* 7 Ill. L. 653; *East Anglian Ry Co. v. Eastern Counties Ry Co.* 11 Com. L. 775.

9 *Rider Life Raft Co. v. Beach*, 97 N. Y. 373.

§ 507. Of necessarily incidental powers.—It would be impossible to specify or enumerate in a charter all the acts which a corporation may perform,

Accordingly, it is left for the courts to say what powers, as incidental to those granted, the corporation may be deemed to possess; and looking at the actual powers and the purposes of the grant, the courts uphold all acts which are necessary to give effect thereto.¹ If the power to do a thing is clearly conferred, either expressly or by fair inference, the corporation is at liberty to adopt any appropriate means for its execution not expressly forbidden; as the mode and manner of its execution, in the absence of limitations, is left to the sound discretion of the corporate authority.² But the principle of necessarily incidental powers cannot be made to cover acts which are illegal, as in contravention of statute, against public policy, or *mala per se*.³

1 *Woods' Railway Law*, 437; *Thomas v. The Railroad*, 101 U. S. 71; *Central R. R. Co. v. Collins*, 40 Ga. 58; *Mobile etc. R. R. Co. v. Franks*, 41 Miss. 491; *Baltimore v. Baltimore etc. R. R. Co.* 21 Md. 50; *State v. Baltimore etc. R. R. Co.* 6 Gill (Md.) 323; *Davis v. Old Colony R. R. Co.* 131 Mass. 56; 41 Am. Rep. 211; *Commonwealth v. Erie etc. R. R. Co.* 27 Pa. St. 339; 67 Am. Dec. 471; *Delaware etc. Canal Co. v. Camden etc. R. R. Co.* 16 N. J. Eq. 321; *Morris Canal etc. Co. v. Central R. R. Co.* 16 N. J. Eq. 419; *Morris etc. R. R. Co. v. Sussex R. R. Co.* 20 N. J. Eq. 542; *Huribut v. Marshall*, 62 Wis. 510; *Attorney-General v. Great Eastern Ry. Co.* Law R. 5 App. C. 73. See, also, *Railway Co. v. McCarthy*, 26 U. S. 252; *Green Bay etc. L. R. Co. v. Steamboat Co.* 107 U. S. 98.

2 *Woods' Railway Law*, 438; *Cleveland & M. R. R. Co. v. Himrod Furnace Co.* 37 Ohio St. 321.

3 *Vide infra*, § 535 et seq.

§ 508. **Examples of necessarily incidental powers.**—As incidental to its other powers, and in order to raise funds for the purpose of conducting its business, a corporation may mortgage its property,¹ and issue negotiable paper for use in the course of its business; although, of course, it may not become a party to bills or notes for the accommodation of others.² As incidental to its expressly granted powers a corporation may build side-tracks



to the establishment of large shippers,² erect telegraph lines along its route,³ maintain restaurants at its stations,⁴ cart freight from and to its depots,⁵ offer and pay a reward for the arrest and conviction of persons maliciously obstructing its tracks,⁶ and out of its funds give gratuities to servants or directors of the company.⁷ In a case recently decided in England it was held that dissenting shareholders could not enjoin as *ultra vires* the payment of an annuity to the family of a deceased superintendent of a banking company, for, it was said, the act was conducive to the interests of the company.⁸

1 Lehigh etc. Co. v. West Desere etc. Works, 63 Wis. 45.

2 National Bank of Republic v. Young, 41 N. J. Eq. 531; Fifth Nat. Bank v. First National Bank, 48 N. J. 513.

3 Wilson v. Furness R'y Co. Law R. 9 Eq. 23.

4 Prather v. Western Union Telegraph Co. 89 Ind. 501; Western Union Telegraph Co. v. Rich, 19 Kan. 617; 27 Am. Rep. 139.

5 Flanagan v. Great Western R'y Co. Law R. 7 Eq. 116.

6 Attorney-General v. Grand Trunk R. R. Co. 16 Dec. des Tr. (L. C.) 9.

7 Central R. R. etc. Co. of Georgia v. Cheatham, 25 Ala. 332; where it was also held that such an offer would be binding upon the company, though made by the superintendent of its road without authority from the directors, on the ground that it is within the scope of his general duties.

8 Hutton v. West Cork R'y Co. 23 Ch. Div. 654; Browne & Theobald's Railway Law, 97.

9 Henderson v. Bank of Australasia, per Lord NORTH, 21 Q. B. Div. 382; 4 Ry & Corp. Law J. 214.

§ 509. Additional examples of necessarily incidental powers.—Under authority to purchase land, in order to procure stone and other material needed in the construction of its road, a railway company may make purchases of land for the purpose of procuring cross-ties and firewood.¹ It would seem that a company possessing rolling-stock acquired or manufactured for the purposes of the

company would be entitled to let such rolling-stock when it is not wanted for the working of its own line.² Where the lines of two companies are continuous, and the traffic of the one can be profitably worked only in connection with the other, it would seem that the latter may agree to supply the former with such rolling-stock as it may require, though this may involve the manufacture of rolling-stock in excess of its own wants.³ A railway company may charge for the use of weighing machines for goods at its stations.⁴ A railway company bound to supply boats for a ferry may employ the boats when not wanted for the ferry in excursions to places not mentioned in its acts of incorporation.⁵ But when the special act of incorporation provided that lands purchased by the company should vest in them for the use of a certain navigation, but for no other use or purpose whatever, it was held that the company could be restrained at the suit of a neighboring land-owner from using a reservoir constructed upon the purchased lands for the purpose of letting boats for hire.⁶

1 Mallet v. Simpson, 94 N. C. 37; 55 Am. Rep. 595.

2 Brown & Theobald's Railway Law, 96; citing Attorney-General v. Great Eastern R'y Co. 11 Ch. Div. 449; 48 Law J. Ch. 428; 5 App. C. 473.

3 Attorney-General v. Great Eastern R'y Co. 11 Ch. Div. 449; S. C. 48 Law J. Ch. 428; 5 App. C. 473; Browne & Theobald's Railway Law, 97.

4 London etc. R'y Co. v. Price, 11 Q. B. Div. 485; Browne & Theobald's Railway Law, 97.

5 Forest v. Manchester etc. R'y Co. 30 Beav. 40; Browne & Theobald's Railway Law, 96.

6 Bostock v. North Staffordshire R'y Co. 5 De Gex & S. 584; 4 El. & B. 798; 3 Smale & G. 283; Browne & Theobald's Railway Law, 96.

§ 510. **Additional examples—Of fostering other enterprises.**—Whatever be a company's legitimate business, it may foster it by all the usual means, provid-

ed it do not entangle itself in affairs with which it has no legitimate concern.¹ It is not essentially *ultra vires* of a corporation to purchase stock in another corporation.² Thus, a railway company may lawfully make advances of money or supplies to another railway corporation to enable it to complete its line, when the latter is to operate as a natural feeder to the former, taking the bonds or stock of the latter as collateral security.³ And unless precluded by its charter, a corporation may acquire a joint interest in the ownership of a ferry, and may enforce an accounting for its proportion of the profits.⁴ In New York authority is conferred by statute upon any railroad company, created under and by the laws of that State or of any adjoining State, to subscribe for, take and hold the stock of union depot companies created under that act, in such amounts as the directors of the subscribing company may, from time to time, deem best for its interests.⁵

1 Green's *Brice's Ultra Vires*, 88.

2 *Hill v. Nisbet*, 107 Ind. 341; *Evans v. Bailey*, 66 Cal. 112. *Contra*, *Salmons v. Laing*, 12 Beav. 339. *Vide supra*, § 51.

3 *Taylor County v. Baltimore etc. R. R. Co.*, 35 Fed. Rep. 161; 4 *Ky. Corp. Law J.* 8, 10.

4 *Hackett v. Multnomah Ry. Co.*, 12 Or. 124; 83 Am. Rep. 327.

5 N. Y. Laws of 1882, ch. 373.

§ 511. The limit to which fostering other enterprises may extend.—But although a company may foster its legitimate business by all the usual means, yet “it may not go beyond this; it may not, under the pretense of fostering, entangle itself in proceedings with which it has no legitimate concern.” The courts have determined that such means shall be direct, and that a company shall not enter into en-

gagements, as, to render assistance to other undertakings, from which it anticipates a benefit to itself, not immediately but mediately, by reaction as it were from the success of the operations thus encouraged, and that all such proceedings inevitably tend to breaches of duty on the part of directors, and to an abandonment of its peculiar objects on the part of the corporation.¹ Thus, it is held that a railway may not subscribe to a musical festival even for the ultimate object of increasing travel.² And a subscription of a railway company to the Imperial Institute has been held *ultra vires*.³ So, it is said that a railway cannot secure the capital and guaranty the profits of a steamboat company run in connection with its line.⁴ So again, in a late case, where a railway corporation, having authority under its charter "to do all lawful acts properly incident to a corporation, and necessary and proper to the transaction of business for which it is incorporated," and possessing "such additional powers as may be convenient for the due and successful execution of the powers granted," attempted, in order to induce an elevator company to subscribe to its stock, to guaranty a certain dividend on the elevator stock, the act was held *ultra vires* and void.⁵ Likewise, a railway company may not form a partnership to buy and operate a steamboat on a river not constituting a part of the course of the railway.⁷ Every member of the company having purchased its shares has a right to expect that the conditions upon which the charter was obtained will be performed; and it is no sufficient answer to a shareholder expecting his dividend, that the money has been expended upon an undertaking

which at some remote period may be highly beneficial to the railway.¹

1 *Green's Brice's Ultra Vires*, 22.

2 *Davis v. Old Colony R. R. Co.* 131 Mass. 253; 41 Am. Rep. 221. *See State Board of Agriculture v. Citizens' Street R'y Co.* 47 Ind. 47. Am. Rep. 702, holding that a railway company may make a subscription to secure the permanent location of a State fair upon its line.

3 *Towninson v. Southeastern R'y Co.* 25 Ch. Div. 675; *Brown & Theobald's Railway Law*, 97.

4 *Macgregor v. Deal etc. R'y Co.* 22 Law J. Q. R. 69; 18 Q. R. 612. *See also* *Man v. Eastern Counties R'y Co.* 10 Beav. 1; *Brown & Theobald's Railway Law*, 96.

5 *Memphis etc. Co. v. Memphis etc. R. R. Co.* 1 Pickle, 703.

6 *Central R. R. etc. Co. of Georgia v. Smith*, 76 Ala. 572; 20 Am. Rep. 353.

7 *East Anglian R'y Co. v. Eastern Counties R'y Co.* 11 Com. R. 771.

§ 512. Examples of powers held not necessarily incidental.—A corporation is not authorized to make a loan to a shareholder by a provision in its charter creating in its favor a lien upon his shares to secure any indebtedness from him to the company.¹ A corporation, authorized by its charter to sell the real estate necessary for the transaction of its business when not required for the uses of the corporation, cannot lease such real estate, nor can it maintain under a lease an action for rent, such lease not being necessary to the exercise of the purposes for which it was chartered.² By the constitution of Pennsylvania a company doing business as a common carrier cannot engage in mining, nor manufacturing articles for transportation over its works, nor directly or indirectly engage in any other business; nor hold any land except such as is necessary to its business.³ This is the rule, also, at common law. Thus a railway company has no implied authority to work coal mines, except for its own use, nor to deal in coal for purposes of profit.⁴ But

Here a company has worked collieries, a subsequent act authorizing it to dispose of its collieries within five years will legalize past workings and entitle the company to continue the workings down to the sale.⁵ A railway company cannot, as incident to powers expressly granted, build a canal;⁶ or improve the navigation of a stream.⁷ No action lies for money due under a contract to employ a person for a matter outside of the ordinary business of the company.⁸

1 Webster v. Home Machine Co. 54 Conn. 394.

2 Metropolitan Concert Co. v. Abbey, 52 N. Y. Super. Ct. 97.

3 Pa. Const. (1874), art. xvii, § 5. But mining or manufacturing companies may carry their products over their own railways of fifty miles in length.

4 Attorney-General v. Great Northern R'y Co. 8 Week. R. 556; 1 Drew. 8, 154; Browne & Theobald's Railway Law, 96.

5 Eccles Commercial Co. v. North Eastern R'y Co. 4 Ch. Div. 845; Browne & Theobald's Railway Law, 96.

6 Plymouth R. R. Co. v. Colwell, 39 Pa. St. 337; 30 Am. Dec. 523.

7 Munt v. Shrewsbury etc. R'y Co. 13 Beav. 1.

8 Cope v. Thames Haven Dock & R'y Co. 3 Ex. 541; Browne & Theobald's Railway Law, 103.

§ 513. *Ultra vires* acts apparently *infra vires*. There is a large class of *ultra vires* acts which are not *per se* beyond the corporate powers, but which for some other reason are unauthorized. Thus, a corporation may have authority to perform an act for a purpose designated in its charter, but no authority to do it for a different purpose.¹ Again it may be authorized to incur indebtedness to a specified amount, but borrowing in excess of that amount, is *ultra vires*.² Thirdly, where the charter requires corporate acts to be done in a certain manner or prescribes certain preliminaries to the exercise of a power, the disregard of these provisions renders the action of the company *ultra vires*.³

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Fourthly, an act may be *ultra vires* by reason of its being done at a place where the corporation has no authority to act.⁴ Where the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect and the defense of *ultra vires* is available against him.⁵ But if a contract would under ordinary circumstances be within the corporate powers, and the other party, exercising reasonable care, does not discover that by reason of the particular circumstances of the case the corporation is in that instance exceeding its charter privileges, it cannot plead its want of authority as a ground upon which to avoid liability.⁶ Thus, where directors have power to bind the company on certain conditions, a person dealing with them may assume that the conditions have been fulfilled.⁷ And an innocent holder of negotiable securities which it is in the power of directors to issue, is not bound to see that certain preliminaries incumbent upon the company have been gone through with.⁸ It has even been said to be immaterial that the other party knew that the act was done with an unauthorized object in view, provided he has done nothing in furtherance of the unlawful design;⁹ but the better rule is, that if the contract is *ultra vires* within the knowledge of the party with whom it is made, he cannot afterward enforce it.¹⁰

1 *Vide infra*, § 515.

2 *Poole v. West Point etc. Assoc.* 30 Fed. Rep. 513; *Warfield v. Marshall County etc. Co.* 72 Iowa, 666; *Ossipee Manuf. Co. v. Canny*, 52 N. H. 295; *Auerbach v. Le Sueur Mill Co.* 23 Minn. 291. *Vide infra*, § 516.

3 *Vide infra*, § 514.

4 *Vide supra*, §§ 435, 436, 465.

5 *Bissell v. Michigan etc. R. R. Co.* 22 N. Y. 264.

Express Co. v. Railroad Co. 99 U. S. 191, 199; *Zabriskie v. Cleveland R. R. Co.* 23 How. 381, 398; *Bissell v. Michigan etc. R. R. Co.* 22 N. 264; *Davis v. Old Colony R. R. Co.* 131 Mass. 258, 260; 41 Am. Rep. 221; *Worcester etc. Turnpike Co. v. Willey*, 16 Ind. 34; *Eastern Counties R'y v. Hawkes*, 5 H. L. Cas. 331, 338. *Cf. Fontaine v. Carmarthen R'y Co.* 5 322.

7 *Totterdell v. Fareham Brick Co.* Law R. 1 Com. P. 674; *Royal Brit-Bank v. Turquand*, 5 El. & B. 248; 6 El. & B. 327.

8 *In re Land Credit Co. Ex parte Overend & Gurney*, 4 Ch. 460.

9 *Tracy v. Talmage*, 14 N. Y. 132; 67 N. Y. 132; 67 Am. Rep. 132.

0 *Eastern Counties R'y Co. v. Hawkes*, 5 H. L. Cas. 331, 338.

§ 514. (a). **Infra vires acts rendered ultra vires by the manner of performance.**—This class of *ultra vires* acts finds many illustrations in agreements entered into by directors acting severally with respect to business which they have no authority to transact except as a board. When the general laws of the State or the corporate charter requires such joint action, contracts entered into by them separately are not binding upon the corporation, or the other contracting party is affected with knowledge thereof.¹ But the other contracting party is not presumed to have knowledge of the by-laws and rules of the corporation. Accordingly, it is no defense to an action for breach of a contract by a corporation, that, in entering into the contract, it had violated its own rules, when that fact was within its knowledge at the time the contract was entered into.² Thus, in a recent case it was held that parties contracting with a corporation without actual notice of rules adopted by it, by which it exempts itself from liability on contracts unless they are in writing and signed by its president, will not be bound by such rules.³ Where it is provided by statute, as in Wisconsin,⁴ that the deed of a corporation must be signed by its president or other authorized officer, and sealed and counter-

signed by the secretary or clerk, these requirements must be strictly complied with; a deed signed by the president but not countersigned by the secretary being invalid, even though the company has authorized the president to make it.⁵

1 *Stagytown etc. Co. v. Craver*, 45 Pa. St. 386; *Baldwin v. Canfield*, 2 Minn. 43; *Lockwood v. Thunder Bay River Boom Co.* 42 Mich. 533, 534; *Gasswiler v. W.* 83 Cal. 12; 91 Am. Dec. 697; *Hillger v. Overman etc. Mfg. Co.* 6 Nev. 51; 13 Arcy v. Lamar etc. Ry. Co. Law R. 2 Ls. 156; 3 C. 4 Hurl & C. 403; *Elgerly v. Emerson*, 23 N. H. 535, 567; 55 Am. Dec. 267; *Isapoth & L. ne v. Bethlehem Manuf. Co.* 12 N. H. 205, 224; 37 Am. Dec. 23; *First National Bank v. Christopher*, 11 Vroom. 435; 29 Am. Rep. 382; 4 N. J. 435, 457; *Junction R. R. Co. v. Reeve*, 15 Ind. 236; *Williams v. Chicago etc. Ry. Co.* 15 Ind. 828; *Yellow Jacket etc. Manuf. Co. v. Stevenson*, 5 Nev. 21; 13 Arcy v. Tamar & Hild etc. Ry. Co. Law R. 2 Ex. 13; cf. *Stetsonson v. Polk*, 71 Iowa, 278; *East London Water Works Co. v. Bancey*, 4 Bing. 293; *Browne & Theobald's Railway Law*, 2d Edn., in re *Bonel's Electric Telegraph Co.* 40 Law J. Eq. 567.

2 *Samuel v. Fidelity etc. Co.* 40 Hun. 122.

3 *Walker v. Wilmington etc. R. R. Co.* 26 S. C. 86.

4 Rev. Stat. Wis. § 2215.

5 *Galloway v. Hamilton*, 66 Wis. 657.

§ 515. (b). *Infra vires* acts rendered *ultra vires* by the purpose of performance.—Where a corporation authorized to perform an act for one purpose exercises its privilege for an unauthorized purpose, it cannot take advantage of its want of authority and avail itself of the plea of *ultra vires*.¹ Thus, a corporation empowered to make a note for any purpose will not be permitted to allege, as against a holder in good faith, that as to the particular note in question, it exceeded its power.²

1 *Cowell v. Springs Co.* 100 U. S. 65; *Galveston R. R. Co. v. Cowdrey*, 11 Wall. 453; *Tracy v. Talmage*, 14 N. Y. 162; 67 Am. Dec. 132; *Moss v. Rensselaer etc. Co.* 5 Hill, 137; *Oxford Iron Co. v. Spradley*, 51 Ala. 171; *National Water etc. Co. v. Clarkin*, 14 Cal. 544, 553; *Thompson v. Lambert*, 44 Iowa, 239; *Eastern Counties Ry. Co. v. Hawkes*, 5 H. L. Cas. 331.

2 *Lehigh Valley Coal Co. v. West Depue Agricultural Works*, 63 Wis. 45.

§ 516. (c). *Infra vires* acts rendered *ultra vires* by the extent of performance.—The best illustra-

ion of this principle is the case of a corporation borrowing a sum of money less than the amount authorized by its charter, but which, together with amounts previous'y borrowed, exceeds the total amount of indebtedness that it is authorized to contract.¹ Although a corporation has incurred an indebtedness in excess of the charter or statutory limit, the contract under which it was incurred is binding upon it whenever it has actually received the money borrowed, or the services or property for which the indebtedness was assumed.² Thus, a corporation, even though forbidden to do so by its charter, may execute a mortgage for more than half the stock actually paid up, without the mortgage being invalid on the ground of *ultra vires*.³ So a *bona-fide* holder of negotiable paper issued by a corporation which has power to issue such paper under any circumstances, has a right to presume that such circumstances attended the issuing of it as carry the requisite authority, and it is no more liable to impeachment in his hands for any infirmity than is any other business paper.⁴ And the shareholders, after having admitted the company's liability for a particular debt, will be estopped from repudiating it on the ground that it was in excess of the indebtedness which the law permitted the corporation to incur.⁵

1 *Ossipee Manuf. Co. v. Canney*, 52 N. H. 295; *Auerbach v. Le Sueur Mill Co.* 23 Minn. 291.

2 *Poole v. West Point etc. Assoc.* 30 Fed. Rep. 513; *Warfield v. Marshall County etc. Co.* 72 Iowa, 666.

3 *Warfield v. Marshall County etc. Co.* 72 Iowa, 666.

4 *National Bank of Republic v. Young*, 41 N. J. Eq. 531.

5 *Poole v. West Point etc. Assoc.* 30 Fed. Rep. 513.

§ 517. **The personal liability of directors herein.**—Directors who enter into contracts which

they have power to make after certain preliminary steps have been taken, impliedly represent that those steps have been taken, and may be made personally liable if they have not perfected their powers.¹ Thus, directors borrowing money after the company's powers are exhausted, impliedly represent that they have power to borrow, and may be made personally liable.² In the same way, where directors, who had no power to bind the company, stated to a bank that the manager had authority to draw checks on account of the company, they were held personally liable to repay the bank,³ but instructions given by directors to the bankers of the company to honor its checks drawn in a certain manner, at a time when there was a balance at the bank in its favor, have been held not to impose any liability upon the directors to repay checks subsequently drawn upon the bank when the account of the company was overdrawn.⁴

1 Browne & Theobald's Railway Law, 110. See *Cherry v. Colonial Bank*, Law R. 3 P. C. 24; *Richardson v. Williamson*, Law R. 6 Q. B. 23; *Collen v. Wright*, 8 El. & B. 647. See, too, *Lakeman v. Mountstuart*, Law R. 7 H. L. 17; *Beattie v. Lord Ebury*, 7 Ch. 777; Law R. 7 H. L. 12.

2 Browne & Theobald's Railway Law, 110; *Firbank's Executors v. Humphreys*, 13 Q. B. Div. 51; *Charles v. Brunswick Soc.* 5 Com. P. Div. 331; 5 Q. B. Div. 696; *Weeks v. Probert*, Law R. 8 Com. P. 427.

3 Browne & Theobald's Railway Law, 110; *Cherry v. Colonial Bank*, Law R. 3 P. C. 24, where the account of the company was overdrawn, to the knowledge of the directors.

4 *Beattie v. Lord Ebury*, Law R. 7 H. L. 102.

§ 518. Who may plead *ultra vires* — (a). A single dissenting shareholder.—*Ultra vires* acts cannot be questioned collaterally by parties whose right: are in no way infringed thereby. Thus, the right to object to the legal capacity of a corporation to hold real estate is vested in the common-

health alone.¹ Accordingly, a deed of land to a corporation is valid, even though it is prohibited by its charter from holding real estate, until the state vacates such deed by a direct proceeding instituted for that end.² For example, a conveyance of land to a foreign corporation forbidden by statute to acquire and hold real estate, is not void, if it passes the title to the corporation, and it may hold the property subject to the commonwealth's right of escheat.³ Of the parties in interest who may question the *ultra vires* acts of a corporation, dissenting shareholders, who have not been estopped from so doing, by accepting the benefits of the transaction, or by sleeping upon their rights until superior equities have arisen, stand first. It is not necessary that a majority of the shareholders should join in seeking to set aside a contract upon the plea of *ultra vires*. One shareholder alone may maintain his action therefor, so long as he has not himself ratified or acquiesced in the act, for there is no authority in a majority of the stockholders, although in meeting duly assembled, to make any disposition of the corporate funds or property unauthorized by the constitution of the corporation.⁴ While it is within the power of the shareholders, by a vote of a majority of those in interest, to ratify any unauthorized act of the corporate directors, officers and agents, which that majority might in the first instance have authorized,⁵ it is not within the power of the majority to ratify any *ultra vires* act against the will of a single dissenting shareholder, for the shareholders cannot, by ratification, confirm that which they originally lacked the power to authorize.⁶ Where share-

holders entitled to representation are deprived thereof, equity will restrain *ultra vires* acts, pending litigation to enforce the right of representation.

1 Hickory Farm Oil Co. v. Buffalo etc. R. R. Co. 32 Fed. Rep. 21

2 Mallett v. Simpson, 94 N. C. 37; 55 Am. Rep. 594.

3 Hickory Farm Oil Co. v. Buffalo etc. R. R. Co. 32 Fed. Rep. 21
Commonwealth v. New York etc. R. R. Co. 114 Pa. St. 340.

4 Abbott v. American etc. Co. 4 Blatchf. 489; S. C. 33 Barb. 578; Alliance v. Roome, 52 Barb. 399; Taylor v. Earle, 8 Hun. 1; Smith v. N. York etc. Co. 18 Abb. Pr. 419; Brady v. Mayor, 16 How. Pr. 432; Bart v. Quicksilver Mining Co. 9 Abb. Pr. N. S. 284; Kean v. Johnson, 9 N. Y. Eq. 401; Middlesex etc. R. R. Co. v. Boston etc. R. R. Co. 115 Mass. 3; Robbins v. Clay, 33 Me. 132; Tippecanoe County v. Lafayette etc. R. Co. 50 Ind. 85; Ashbury Railway Carriage Co. v. Rische, Law R. 1 H. 653; Lydev. Eastern Bengal R'y Co. 36 Beav. 10; Taylor on Corporations, 2.

5 Vide supra, §§ 504 and 505.

6 See cases cited supra, note 1, and Bird v. Bird's Patent etc. Co. 1 Oh. 358.

7 Mackintosh v. Flint etc. R. R. Co. 34 Fed. Rep. 582.

§ 519. (b). Corporate creditors of a failing concern.—So long as a company is a “going concern,” and the interest which corporate creditors have in its capital stock for the payment of their debts is in no way endangered by a diversion of that fund from the purposes for which the enterprise was incorporated, it does not appear that creditors may interfere with its affairs upon the ground that it is exceeding its charter privileges. The question then is solely between the shareholders and the State, and if ratified by the former and not objected to by the latter, no one else may attack any of its transactions upon the ground that they are *ultra vires*. When, however, *ultra vires* transactions are of such a nature as to endanger the security of the trust fund to which the creditors have a right to look for the payment of their claims, and especially where the solvency of the company is doubtful, and the amounts in-

ved in the *ultra vires* transactions are large when compared with the capital stock of the corporation, the right of corporate creditors to interfere, either to restrain or to set aside such contracts, is undoubted;¹ and no ratification of *ultra vires* agreements by the shareholders will, in that case, be a bar to the creditor's action.²

Talmage v. Pell, 7 N. Y. 333; Bank Commissioners v. St. Lawrence, 7 N. Y. 513; National Trust Co. v. Miller, 33 N. J. Eq. 155; Abbott v. Baltimore etc. Co. 1 Md. Ch. 512; Bank of Chattanooga v. Bank of Memphis, 9 Hisk. 403. But see Mills v. Northern Ry Co 5 Ch. 621.

1 Galloway v. Hamilton, 63 Wis. 651, and cases cited *supra*.

§ 520. (c). **The other contracting party, until the corporation has performed.**—The party contracting with the corporation may set up its want of authority to enter into the agreement with him until it has performed its part of the contract; for until then he has no assurance but that the corporation itself may plead *ultra vires* at any time, and it is not reasonable to compel him to perform, when he cannot compel the company to do the same. But when the other contracting party has received from the corporation the full consideration of his engagement, he cannot avoid performance on his part by the plea that the contract was beyond the charter privileges and powers.¹ For knowing, or being presumed to know, the limitations of the authority of the corporation with which he was dealing, he is estopped to plead its want of authority;² and moreover, the doctrine of *ultra vires* derives its origin from the principle that certain acts are a violation of a compact between the State, the shareholders, and the creditors of the corporation, a compact to which he is in no way privy; and accordingly the plea is allowed and can be made only

by one of the parties to that compact. Where the claim is merely for the recovery of a sum of money, acts of part performance will not cure the insufficiency of the contract, and the other contracting party may plead *ultra vires* until the whole amount be paid.³ If, however, there is something more to be done under the contract than mere payment of money, if there have been acts of part performance, the company must be taken to have acquiesced in and adopted the contract, and specific performance will be decreed.⁴ Officers of a corporation sued for it for the conversion to their own use of stock which they had purchased for the company, cannot plead by way of defense that the purchase was *ultra vires*.⁵ A corporation in suing upon a contract need not allege power on its part to enter into the contract.⁶

1 National Bank v. Whitney, 103 U. S. 99; Diamond Match Co. v. Roeber, 106 N. Y. 473; 60 Am. Rep. 484; Whitney Arms Co. v. Barlow, 57 N. Y. 62, 70; 20 Am. Rep. 504; Steam Navigation Co. v. Weed, 17 Barb. 378; Leavitt v. Pell, 27 Barb. 322; Standard Oil Co. v. Shofield, 16 Abb. N. C. 372; Oil Creek etc. R. R. Co. v. Pennsylvania Transportation Co. 83 Pa. St. 160; Chicago etc. R'y Co. v. Derkes, 103 Ind. 520; Ehlman v. U. S. Central etc. Ins. Co. 35 Ohio St. 324. Contra, Chambers v. Falkner, 5 Ala. 419.

2 Pearce v. Madison etc. R. R. Co. 21 How. 441, 443; Alexander v. Gauldwell, 38 N. Y. 480; Davis v. Old Colony R. R. Co. 131 Mass. 256; 4 Am. Rep. 221; Downing v. Mt. Washington Road Co. 40 N. H. 239.

3 Crampton v. Varna R'y Co. 7 Ch. 562; Jackson v. North Wales Ry. Co. 6 Rob. C. 113.

4 Wilson v. West Hartlepool R'y Co. 2 De Gex, J. & S. 475; Laird v. Bickenhead R'y Co. JOHNSON (Eng. Vice-Ch.), 500; London etc. R'y Co. v. Inter, Craig & P. 57. And see Crook v. Corporation of Seaford, 1 Ch. 551.

5 St. Louis Stoneware Co. v. Partridge, 8 Mo. App. 217.

6 St. Paul etc. Co. v. Dayton, 37 Min. 364.

§ 521. The consideration to be surrendered when the contract is set aside.—When a corporation has repudiated a contract as *ultra vires*, it must restore to the other party whatever it may

re obtained from him,¹ unless the thing acquired become so blended with the corporate property that it cannot be rendered up without invading the rights of persons who have never assented to the contract nor in any way acquiesced in it.² In accordance with the doctrine of equity, requiring a corporation to account for the benefits it has accrued to it under an *ultra vires* transaction, the court, while annulling a contract as *ultra vires*, will enforce an accounting on the basis of a reasonable compensation for the profits realized under the contract, together with interest thereon.³

Brice's *Ultra Vires* (2nd Eng. ed.), 769; Newcastle Northern R. R. Co. v. Simpson, 23 Fed. Rep. 214; Humphrey v. Patrons' Mercantile Assoc., 607; White v. Franklin Bank, 22 Pick. 151; In re Cork etc. Ry Co., 4 Ch. 748; Ernest v. Nicholls, 6 H. L. Cas. 401; Burge's and Stock's Case, Law R. 5 Ch. 39; Hawken v. Bourne, 8 Mees. & W. 703; Hall v. Mansel, 5 Q. B. 526; Hawtayne v. Bourne, 7 Mees. & W. 595. Ex parte Cooper, 1 De Gex, M. & G. 147.

Taylor on Corporations, § 310, citing Hill's Case, Law R. 9 Eq. 605.

Newcastle Northern R. R. Co. v. Simpson, 23 Fed. Rep. 214.

§ 522. **Of ratification and acquiescence in ultra vires acts.**—If all the shareholders of a solvent corporation ratify or acquiesce in an *ultra vires* act which does not endanger its ability to meet the claims of corporate creditors, and which is not illegal as contrary to statute, *malum per se*, or against public policy, the contract may be enforced. It is not essential that there be an express ratification. The intelligent acquiescence of all parties who have a right to object is equivalent to an express ratification.¹ Thus, a settlement, effected by the directors of a railway company by giving notes, could be regarded as ratified by the company where for a number of years it has not disputed its

liability on the notes, has paid interest on them, and has accepted reports which mentioned them amongst the outstanding obligations.² So, where money was advanced directly to a corporation and to its president for its benefit, and the corporation recognized both sums as its debts, and attempted to secure them, it was held that they would be regarded in equity as corporate debts.³ A purchase made by a shareholder into a railway corporation, with cognizance that it is acting on an assumed power to invest in the stock of railway corporations without the State which created it, will operate as an implied recognition of such assumed power.⁴ The principles stated above with respect to ratification and acquiescence apply as well to bar any defense to actions based upon tort as to those based upon contract. Thus, a corporation, chartered as a railway and banking company, but also running a steamboat, is estopped from setting up the defense of *ultra vires* in an action for an injury sustained through the negligence of an officer of the steamboat.⁵

1 "Intelligent" ratification, or acquiescence, is such as is based upon knowledge of all the material facts, even though there may be ignorance of the legal effect of those facts: *Kelly v. Newburyport etc. R. R. Co.* 141 Mass. 496.

2 *Kelly v. Newburyport etc. R. R. Co.* 141 Mass. 496.

3 *Poole v. West Point etc. Assoc.* 30 Fed. Rep. 513.

4 *Venner v. Atchison etc. R. R. Co.* 28 Fed. Rep. 581.

5 *Central R. R. etc. Co. v. Smith*, 76 Ala. 572; 52 Am. Rep. 353.

§ 523. Accepting the fruits of the contract a bar to pleading "*ultra vires*."—The corporation cannot avail itself of the defense of *ultra vires*, where the contract has been in good faith fully performed by the other party, and the corporation

benefit of the contract and the per-
 Although there may be a defect of
 corporation to make a contract, if a
 made by it is not in violation of the terms
 of the corporation, or of any statute
 governing it, and the corporation has, by its prom-
 ised a party relying upon such promises,
 execution of the contract, to expend money
 to perform his part thereof, the corporation also
 is bound to perform.³ And so every stockholder of a
 corporation who participates in the fruits of an
 unauthorized act, is estopped from setting up the
 corporation's want of authority to perform it.³ In
 such cases the plaintiff's recovery rests on the
 fact that all the persons that would have
 been entitled to object, allowed the plaintiff to go
 on and perform his part thereof, under the reason-
 able assumption of their general acquiescence there-
 in. This principle has been repeatedly held to be as
 applicable to the other contracting party as to the
 corporation.⁵ In a recent case, it was decided, in ac-
 cordance with these principles, that a railway com-
 pany will be estopped from setting up as a defense
 in an action for rent on a lease of a branch road, the
 validity of which was *ultra vires*, when the branch was construct-
 ed upon the company's promise to lease it for a long
 number of years, and when it has actually operated it
 for a time without objection.⁶ Where the direct-
 ors of an insolvent company issued bonds, and
 pledged them as collaterals for money advanced by
 a bank to meet pressing obligations, it was held
 that at a mere failure to enter of record the order au-
 thorizing the hypothecation could not be taken
 advantage of by the corporation or by the other

creditors as a defense against the bank's claim for preferred participation in the distribution of its assets.¹ But in a case in which a corporation covenanted to pay rent, in advance, in consideration of future occupation, the agreement was held not to be within the rule permitting a contract to be enforced against a corporation, when the contract is *ultra vires*, and the benefit of it has been enjoyed by the corporation.²

1 *National Bank v. Matthews*, 98 U. S. 621; *Stewart v. National Bank*, 2 Abb. U. S. 424; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; 29 Am. Rep. 163; 67 Am. Dec. 132; *Parish v. Wheeler*, 22 N. Y. 434; *De Graff v. American etc. Co.* 21 N. Y. 124; *Taylor County v. Baltimore etc. R. R. Co.* (W. 1885) 1 R'y & Corp. Law J. 10; *Louisville etc. R'y Co. v. Flammagan*, Ind. —; *Durst v. Gale*, 83 Ill. 136; *Hertzo v. San Francisco*, 33 Cal. —; *Connecticut River Savings Bank v. Fiske*, 60 N. H. 363; *Eastern Connecticut R'y Co. v. Hawkes*, 5 H. L. Cas. 331. Cf. *Illinois Central R. R. Co. v. Thomson*, 116 Ill. 152.

2 *State Board of Agriculture v. Citizens' Street R'y Co.* 47 Ind. 47; 47 Am. Rep. 702; *Hitchcock v. Galveston*, 96 U. S. 311.

3 *Branch v. Jessup*, 106 U. S. 468; *Zabriskie v. Cleveland etc. R. R. Co.* 23 How. 331; *Taylor v. South & North Alabama R. R. Co.* 13 Fed. Rep. 152; *Tyrrell v. Cairo etc. R. R. Co.* 7 Mo. App. 294; *Peoria etc. R. R. Co. v. Thompson*, 103 Ill. 187.

4 *Taylor on Corporations*, §§ 279, 280, reviewing *Bissell v. Michigan etc. R. R. Co.* 22 N. Y. 258; *Bradley v. Ballard*, 55 Ill. 413; 7 Am. Rep. 22; *Durst v. Gale*, 83 Ill. 136.

5 *De Graff v. American etc. Co.* 21 N. Y. 124.

6 *Camden etc. R. R. Co. v. May's Landing etc. R. R. Co.* 48 N. J. 52.

7 *Hubbard v. Camperdown Mills*, 26 S. C. 581.

8 *Oregonian R'y Co. v. Oregon R'y & Nav. Co.* 23 Fed. Rep. 232.

§ 524. *Laches* as a bar to pleading "*ultra vires*."—Shareholders wishing to prevent *ultra vires* acts, or to absolve the corporation from responsibility for them, must be vigilant and swift. For a court of equity may refuse to interfere with a corporation at the instance of a stockholder in respect to an unauthorized contract which has been fully executed, when if he had applied in season for an order to restrain the execution of the

tract, equity might have felt bound to grant relief.² Especially is this so when the dominant has stood by and allowed the illegal transaction to be consummated, and has allowed and incited others to become interested in the corporation on the supposition that the existing state of things is legal and proper.³

1 *Pneumatic Gas Co. v. Berry*, 113 U. S. 322; *Taylor on Corporations*, 79; *Cartlett v. Starr* (Texas, 1888); *Thompson v. Lambert*, 44 Iowa, 239; *Osac etc. Co. v. Donat*, 10 Colo. 529; where acquiescence of a hundred years in a lease made by an authorized agent estopped from pleading *ultra vires*.

2 *Terry v. Eagle Lock Co.* 47 Conn. 141, 161.

3 *Terry v. Eagle Lock Co.* 47 Conn. 141, 161.

III.

§ 525. Of illegal corporate acts.—As we have seen, an illegal corporate act is one which, in addition to being *ultra vires*, is also invalid, because some rule of law forbids it to be done;¹ for any corporate contract may have the vices which sometimes infect the contracts of individuals. It may involve a *malum per se*, or a *malum prohibitum*, and may be void for any cause which would avoid the contract of a natural person.² But unless the illegality inheres in the very act or contract itself, it will not render the transaction void.³ The mere knowledge on the part of the corporation that the other party is going to use the proceeds of the contract for some illegal purpose, does not render the contract void, so far as it is concerned, provided it does not participate in the illegal undertaking.⁴ An illegal act cannot be ratified nor made valid even by the unanimous consent of the stockholders.⁵

¹ *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 68; 20 Am. Rep. 504; *Bissell v. Michigan etc. R. R. Co.* 22 N. Y. 264.

2 *Bissell v. Michigan etc. R. R. Co.* 22 N. Y. 264, 269-270.

3 *Orchards v. Hughes*, 1 Wall. 73; *Atlas National Bank v. Savery*, 17 Mass. 75. See Taylor on Corporations, § 293.

4 *Jones v. Planters' Bank*, 9 Heisk. 455; *Bank of Tennessee v. Cummings*, 9 Heisk. 465; Taylor on Corporations, § 293.

5 *Thomas v. The Railroad Co.* 101 U. S. 70, and authorities therein reviewed; *Salem Mill Dam Co. v. Ropes*, 6 Pick. 23, 32; *Ashbury Railway Carriage etc. Co. v. Riche*, Law R. 7 H. L. 653.

§ 526. **Of acts illegal and against public policy.** When a corporation like a railroad company has been granted a franchise intended in a large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions is a violation of the contract with the State, and is void as against public policy.¹ Thus, a railroad cannot without the consent of the State transfer to others the rights and powers conferred by its charter and relieve itself of the duties which the grant imposes upon it;² nor without legislative sanction can it mortgage its franchises,³ nor consolidate with another corporation.⁴ Railways being granted valuable franchises for the good of the whole people, must exercise them impartially in favor of all. It is contrary to public policy for a railway company to give an express company exclusive privileges over its line;⁵ or to give a telegraph company the exclusive privilege of erecting its line along the road;⁶ or to discriminate in rates between shippers, or to allow rebates to some shippers to the exclusion of others.⁷ A contract to convey land to a railway company to secure the location of a station upon it, is contrary to public policy; for railway stations are presumably located with a view to the convenience of the public, and no other motive

would be allowed to operate to influence their location.⁸ As the public has an interest in the proper administration of the powers conferred by the charter,⁹ and as the comfort and safety of the railway may be seriously impaired if the money supposed to be necessary for its maintenance and set apart therefor by the act of incorporation, be expended in other undertakings not contemplated when the act was obtained, such a diversion of the corporate funds is illegal.¹⁰ For the same reason, an agreement between two common carriers that one of them, in consideration of a sum of money to be paid by the other, shall cease to exercise its franchises, has been declared illegal, and an injunction restraining its performance may be obtained by a shareholder of the company which agreed to pay the money.¹¹ Stipulations against liability for the negligence of their employees are likewise void in most States, as contrary to public policy.¹²

1 *Thomas v. The Railroad*, 101 U. S. 71; *Peoria etc. R'y Co. v. Coal Valley Manuf. Co.* 68 Ill. 489; *Chambers v. Manchester etc. R'y Co.* 5 Best & Sm. 538; *London etc. R'y Co. v. London etc. R'y Co.* 5 Jur. N. S. 831; *McGregor v. Dover etc. R'y Co.* 17 Jur. 21; *East Anglian R'y Co. v. Eastern Counties R'y Co.* 11 Com. B. 775.

2 *Thomas v. The Railroad*, 101 U. S. 71; *American Union Telegraph Co. v. Union Pacific R'y Co.* 1 McCrary, 188; *Troy etc. R. R. Co. v. Boston etc. R. R. Co.* 86 N. Y. 107; *Abbott v. Johnstown etc. R. R. Co.* 80 N. Y. 27; 33 Am. Rep. 572; *Middlesex R. R. Co. v. Boston etc. R. R. Co.* 115 Mass. 347; *Stewart's Appeal*, 56 Pa. St. 413; *Wood v. Bedford etc. R. R. Co.* 8 Phila. 94; *Tippecanoe County v. Lafayette etc. R. R. Co.* 50 Ind. 85; *Winch v. Birkenhead etc. R'y Co.* 5 De Gex & S. 562.

3 *Pullan v. Cincinnati etc. R. R. Co.* 4 Biss. 35; *Richardson v. Sibley*, 11 Allen, 65; 87 Am. Dec. 700; *Commonwealth v. Smith*, 10 Allen, 448; *State v. Sherman*, 22 Ohio St. 411.

4 *Pearce v. Madison etc. R. R. Co.* 21 How. 441; *Taylor on Corporations* (2nd ed. 1889), § 305.

5 *Southern Express Co. v. Memphis etc. R. R. Co.* 2 McCrary, 570; *Express Companies v. Railway Companies*, 3 McCrary, 147; *Stanford v. Railroad Co.* 24 Pa. St. 378; *Dinsmore v. Louisville etc. R. R. Co.* 2 Flippin, 672; *New England Express Co. v. Maine Central R. R. Co.* 57 Me. 188; 2 Am. Rep. 31.

6 Western Union Telegraph Co. v. Burlington etc. R'y Co. 3 McCr. 130; Atlantic etc. Telegraph Co. v. Union Pacific R'y Co. 1 McCr. 54. *Contra*, Western Union Telegraph Co. v. Atlantic etc. Telegraph Co. 7 Biss. 367; Western Union Telegraph Co. v. Chicago etc. R. R. Co. 86 Ill. 246; 29 Am. Rep. 28.

7 Stewart v. Lehigh Valley R. R. Co. 38 N. J. 505; Messenger v. Pennsylvania R. R. Co. 37 N. J. 531; N. C. 33 N. J. 407; 13 Am. Rep. 457. *See* also Ragan v. Aiken, 9 Lea, 609; 42 Am. Rep. 681; *Ex parte* Benson, 18 S. C. 38; 41 Am. Rep. 564; Johnson v. Pensacola etc. R. R. Co. 13 Fla. 613, 617; 25 Am. Rep. 731; Houston etc. R'y Co. v. Rust, 58 Tex. 98; Munhall v. Pennsylvania R. R. Co. 12 Pa. St. 150.

8 Fuller v. Dame, 18 Pick. 472; Pacific R. R. Co. v. Seely, 45 Mo. 212; 100 Am. Dec. 369; Destor v. Wathen, 60 Ill. 138; St. Louis etc. R. R. Co. v. Mathers, 71 Ill. 592; 22 Am. Rep. 122; Marsh v. Fairbury etc. R. R. Co. 74 Ill. 414; 16 Am. Rep. 564; Linder v. Carpenter, 62 Ill. 339; St. Joseph etc. R. R. Co. v. Ryan, 11 Kan. 632; 15 Am. Rep. 357; Holladay v. Patterson, 5 Or. 177. *See* Williamson v. Chicago etc. R. R. Co. (Iowa Super. Ct.) 22 Abb. L. J. 29. Compare Workman v. Campbell, 46 Mo. 305. *Contra*, Cedar Rapids etc. R'y Co. v. Spafford, 41 Iowa, 292; First National Bank v. Hendric, 49 Iowa, 404; 31 Am. Rep. 153. *See* Berryman v. Cincinnati etc. R. R. Co. 14 Bush, 755.

9 East Anglian R'y Co. v. Eastern Counties R'y Co. 11 Com. B. 775.

10 East Anglian R'y Co. v. Eastern Counties R'y Co. 11 Com. B. 775.

11 Leslie v. Lorillard, 40 Eun, 392.

12 This subject will be treated *infra* under INJURIES TO PERSONS AND PROPERTY. *See* also Taylor on Corporations, §§ 352-354, and cases there cited.

§ 527. The same subject, continued—Of “lobbying.”—An agreement to pay money to secure the passage of a bill by the legislature can not be enforced against a corporation, for *ex turpe causa non oritur actio*.¹ A railway company may not apply its funds to promote a bill in Parliament for extended powers;² for an agreement to pay the expenses of an application to Parliament for enlarged powers is not merely *ultra vires*, but also illegal as being against public policy;³ but it would seem that a company may devote its funds to oppose a bill, the passing of which would endanger its prosperity.⁴

1 Marshall v. Baltimore etc. R. R. Co. 16 How. 314.

2 Mannsall v. Midland etc. R'y Co. 32 Law J. Ch. 513; Stevens v. South Devon R'y Co. 20 Law J. Ch. 491; East Anglian R'y Co. v. Eastern Counties R'y Co. 11 Com. B. 775; Munt v. Shrewsbury etc. R'y Co. 20 Law J. Ch. 169; 13 Deav. 1; Caledonian R'y Co. v. Solway etc. R'y Co. 33 Weck R. 164; 49 Law T. 526; Wood's Railway Law, 483.

3 *MacGregor v. Dover etc. R'y Co.* 18 Q. B. 618, 632. *Contra*, *Browne Theobald's Railway Law*, 96, saying, that apart from any question of the application of its funds a company may promote or oppose a bill in Parliament, citing, *Lea v. L. C. & D. R'y Co.* 5 Ch. 671; *Steele v. North Metropolitan R'y Co.* 2 Ch. 237; *Telford v. Metropolitan Board of Works*, 13 L. 514; *Heathcote v. North Staffordshire R'y Co.* 2 Macn. & G. 19; 20 W. J. Ch. 82; *Attorney-General v. Manchester etc. R'y Co.* 1 Rob. C. 436; *Manchester etc. R'y Co. v. North Western R'y Co.* 2 Kay & J. 293.

4 *Attorney-General v. Brecon*, 10 Ch. Div. 204; *Attorney-General v. Eastlake*, 11 H. L. Cas. 205; *Attorney-General v. Norwich*, 2 Mylne & C. 406; *Light v. North*, 2 Phill. Ch. 216; *Attorney-General v. Andrews*, 2 Macn. G. 225. See *Regina v. White*, 14 Q. B. Div. 358; *Browne & Theobald's Railway Law*, 95.

§ 528 The same subject, continued—Of “pools.” In England, companies having the same *termini* may, for the purpose of avoiding competition, validly form a pool and distribute traffic and earnings among themselves proportionally,¹ where it does not appear that the interests of the public or of the shareholders are prejudiced thereby.² And an eminent writer has declared that in this country, also, unless there be some statutory prohibition thereof, contracts for “pooling” earnings by rival lines, when made in good faith for self-protection against ruinous competition, and not resulting in the creation of a monopoly injurious to the public, are valid and not contrary to public policy.³ But the agreement by which the pool is formed has been said to be illegal if it extended to future traffic upon a line of railway which a company may thereafter be empowered to construct.⁴ So, also, a scheme amounting to an amalgamation of two existing companies, the profit and loss being brought into one common fund and divided into certain proportions, is illegal.⁵ This subject will be further treated in the discussion of the governmental control of railway corporations.

1 *Hare v. London etc. R'y Co.* 2 Johns. & H. 480. See the judgment in that case, where *Shrewsbury etc. R'y Co. v. London etc. R'y Co.* 17 Q. B. 652, 2 Macn. & G. 324, 3 Macn. & G. 70, 17 Q. B. 652, 16 Brev. 411, 42 Gex M. & G. 116, 6 H. L. Cas. 113, are discussed. See, also, *Lancaster R'y Co. v. Northwestern R'y Co.* 2 Kay & J. 293; *Browne & Theobald's Railway Law*, 288.

2 *Hare v. London etc. R'y Co.* 2 Johns. & H. 480; S. C. 30 Law J. Ch. 11

3 *Wood's Railway Law*, 590-600. *Morrill v. Boston etc. R'y Co.* 5 F. H. 531, apparently *contra*, was decided under a statute prohibiting par-

4 *Midland R'y Co. v. London etc. R'y Co.* 2 Eq. 524; *Browne & Theobald's Railway Law*, 288.

5 *Charlton v. Newcastle etc. R'y Co.* 7 Week. R. 731; *Browne & Theobald's Railway Law*, 288.

§ 529. The same subject. continued—Of trusts. Corporations have no implied authority to enter into partnership with each other,¹ nor with private persons.² Accordingly, a contract whereby the management of the business of two or more companies is placed in the hands of a committee is *ultra vires* and void, as far as unexecuted, whether made by the directors or by all the shareholders. In the case last cited, by the contract of partnership the committee was to have possession of the properties of all the contracting companies for the space of three years, and an action of unlawful detainer was brought by one of the companies to recover its property at the end of two years. It was decided that the contract was as to the remainder of the term unexecuted, and could be repudiated as *ultra vires*;³ and that the contract being void, it could not operate to convert the managers of the combination into tenants from year to year, and entitle them to the statutory notice to quit.⁴

1 *Mallory v. Hananer Oil Works*, 86 Tenn. 598.

2 *Central R. R. etc. Co. of Georgia v. Smith*, 76 Ala. 572; 52 Am. Rep. 353.

3 *Mallory v. Hananer Oil Works*, 86 Tenn. 598. *Vide infra*, § 531.

4 *Mallory v. Hananer Oil Works*, 86 Tenn. 598.

5 *Mallory v. Hananer Oil Works*, 86 Tenn. 598.

§ 530. **Of transportation beyond termini.**—A railway company may properly make contracts for the transportation of freight and passengers beyond the *termini* of its own line;¹ and may arrange with other railway and steamboat companies for the division of the proceeds of that transportation between them in certain proportions.² Authority to transport and deliver passengers and freight beyond its *termini* carries with it the authority to buy and to run a steamboat from the terminus of its road to the line of another,³ although ordinarily a railroad company cannot operate a steamboat line.⁴ In the case of traffic arrangements, where mutual facilities are given, or where one company gives consideration to the other, a working agreement must be presumed to be irrevocable in the absence of evidence to the contrary.⁵

1 Railroad Co. v. Pratt, 22 Wall. 123; Norfolk etc. R. R. Co. v. Shippers' Compress Co. W. Va. (1887); 30 Am. & Eng. R. R. Cas. 57; *Kyle v. Laurens R. R. Co.*, 10 Rich. 382; 70 Am. Dec. 231; St. Louis etc. R. R. Co. v. Larned, 103 Ill. 293; Wheeler v. San Francisco etc. R. R. Co. 31 Cal. 46; 89 Am. Dec. 147. But see Hood v. New York etc. R. R. Co. 22 Conn. 502; South Wales R'y Co. v. Redmond, 10 Com. B. N. S. 675; S. C. 9 Week R. 806.

2 Green Bay etc. R. R. Co. v. Union Steamboat Co. 107 U. S. 98; Columbus etc. R. R. Co. v. Indianapolis etc. R. R. Co. 5 McLean, 450; Buffet v. Troy etc. R. R. Co. 40 N. Y. 168; Olcott v. Tiogo etc. R. R. Co. 27 N. Y. 546; 84 Am. Dec. 298; Wiggins Ferry Co. v. Chicago etc. R. R. Co. 73 Mo. 389; 39 Am. Rep. 519; Elkins v. Camden etc. R. R. Co. 36 N. J. Eq. 241; Wheeler v. San Francisco etc. R. R. Co. 31 Cal. 46; 89 Am. Dec. 147; South Wales R'y Co. v. Redmond, 10 Com. B. N. S. 675; Hare v. London etc. R'y Co. 2 Johns. & H. 80.

3 Shawmut Bank v. Plattsburgh etc. R. R. Co. 31 Vt. 491.

4 Pearce v. Madison etc. R. R. Co. 21 How. 441; Central R. R. etc. Co. of Georgia v. Smith, 76 Ala. 572; 52 Am. Rep. 553; Hoagland v. St. Joseph R. R. Co. 30 Mo. 460.

5 Great Northern R'y Co. v. Manchester etc. R'y Co. 5 De Gex & S. 138; Llanelly R'y Co. v. London etc. R'y Co. Law R. 7 H. L. 550; Browne & Theobald's Railway Law, 287.

§ 531. **Of running privileges.**—A company may enter into an agreement, that another company

shall use its line, paying tolls fixed with reference to the gross receipts, and providing for the carriage of local traffic on certain terms, provided there be no stipulation preventing the first company from exercising its statutory powers, or from entering into similar agreements with other companies or persons.¹ But it may not confer upon another carrier running privileges over its road so extensive as practically to amount to a surrender of its franchises.² The English Railway Clause Act of 1845 authorizes contracts between railway companies for the passage of rolling-stock over each other's lines, and enacts that "for the purpose aforesaid, it shall be lawful for the respective parties to enter into any contract for the division or apportionment of the tolls to be taken upon their respective railways,"³ with the proviso, however, that no such contract shall in any manner affect, increase, or diminish any of the tolls which the respective companies, parties to the contract, shall for the time being be respectively authorized and entitled to demand or receive from any person or any other company, but that all other persons and companies shall, notwithstanding any such contract, be entitled to the use and benefit of any of the said railways, upon the same terms and conditions, and on payments of the same tolls as they would have been in case no such contract had been entered into.⁴

1 *Midland R'y Co. v. Great Western R'y Co.*, 8 Ch. 841; *Great Northern R'y Co. v. Manchester etc. R'y Co.* 5 Law T. N. S. 667; *Browne & Tice's Railway Law*, 287.

2 *State v. Hartford etc. R. R. Co.* 29 Conn. 538; *Ohio etc. R. R. Co. v. Indianapolis etc. R. R. Co.* 5 Am. Law Reg. N. S. 733; *Attorney-General*

v. *Great Eastern R'y Co.* 11 Ch. Div. 449; *Gardner v. London etc. R'y Co.* Law R. 2 Ch. 212; *Johnson v. Shrewsbury etc. R'y Co.* 3 De Gex, M. & G. 914.

3 8 Vict. ch. 20, § 87.

4 8 Vict. ch. 20, § 88.

§ 532. **Of the compensation for running privileges.**—A provision that the receipts from through traffic shall be apportioned between the companies according to their mileage, with an allowance for working expenses, is valid;¹ or the tolls payable may be calculated on a graduated system. Thus, an agreement giving one company power to carry coals over the line of the other was held good, where the consideration agreed upon was that if less than a certain amount of coals should be carried during any six months, such tolls should be paid as would enable the company to pay three per cent. on their paid-up capital, less the clear profits they might make in the same six months, the sum to be paid being increased according to the amount of coals carried up to 400,000 tons, and that if the advance in quantity should raise the dividend to £4 10s. per cent., the toll should never fall below the sum which would enable that dividend to be paid.² But if the consideration amounts to a guaranty by the running company of the dividends upon the share capital of the other, irrespective of the amount of traffic carried, the agreement is beyond the corporate powers.³ Thus, an agreement under which one company is to carry the whole traffic of the other company in consideration of such toll as will, when added to the net profits of the second company, make up its dividend to a certain amount, is not valid.⁴ A company may agree with dock-owners, in consideration of the use of the docks, to pay tolls as well

on goods carried on their line and shipped at the docks as on goods so carried and shipped at other docks in connection with the railway.⁵

1 *Llanelly etc. Co. v. London etc. R'y Co.* Law R. 7 H. L. 531.

2 *Browne & Theobald's Railway Law*, 288; *Great Northern R'y Co. v. South Yorkshire R'y etc. Co.* 9 Ex. 55, 612.

3 *Simpson v. Dennison*, 10 Hare, 51; 16 Jur. 830; *Browne & Theobald's Railway Law*, 288.

4 *Simpson v. Dennison*, 10 Hare, 51; 16 Jur. 830; *Browne & Theobald's Railway Law*, 288.

5 *Taff Vale R'y Co. v. Macnabb*, Law R. 6 H. L. 169. "Such agreement does not *prima facie* extend to goods carried along a line constructed after the date of the agreement and leased to the company." *Browne & Theobald's Railway Law*, 288, citing *Taff Vale R'y Co. v. Macnabb*, Law R. 6 H. L. 169.

§ 533. **No estoppel with respect to illegal acts**
The doctrine of estoppel cannot be applied to bind a corporation to a contract forbidden by law.¹ If a statute expressly forbids a corporation to make a certain contract, the contract is void, even though not expressly declared to be so, and is incapable of ratification; and that the contract is void as unlawful may be pleaded by any one to an action founded directly and exclusively on the contract, unless, (1) the statute expressly states what the consequences of violating it shall be, and those consequences are other than that the contract shall be void;² or, (2) unless the statutory prohibition was evidently imposed for the protection of a certain class of persons, who alone may take advantage of it;³ or, (3) unless to adjudge the contract void and incapable of forming the basis of a right of action would clearly frustrate the evident purposes of the prohibition itself.⁴ So, also, when a statutory prohibition is not express, but arises only by implication from the charter or enabling statute of the corporation, the contract will not be held void

and such a construction would defeat the intent of the statute.⁶

In re Comstock, 3 Sawy. 218; Kent v. Quicksilver Mining Co. 78 N. H. 185; Ogdensburgh etc. R. R. Co. v. Vermont etc. R. R. Co. 4 N. H. 383.

Taylor on Corporations, § 297; In re Jaycox, 12 Blatchf. 209; New York Co. v. Helmer, 77 N. Y. 64; Utica Ins. Co. v. Scott, 19 Johns. 1.

Taylor on Corporations, § 299, citing Pratt v. Short, 79 N. Y. 437, Am. Rep. 531, which hardly seems, however, to support the learned proposition, inasmuch as the statute in that case declared that contracts or securities should be void; Lister v. Howard Bank, 33 Md. 107; Robinson v. Bland, 2 Burr. 1077.

Taylor on Corporations, § 300, citing Beecher v. Marquette etc. Co. 103, 108; Green v. Kemp, 13 Mass. 515; 7 Am. Dec. 169. Cf. Underhill v. Underhill, 52 N. Y. 203; Greenpoint Sugar Co. v. Whittin, 69 Me. 28.

Taylor on Corporations, § 301, citing Gold Mining Co. v. National Bank, 10 U. S. 640; Duncomb v. New York etc. R. R. Co. 84 N. Y. 190; etc. Manuf. Co. v. Rocky Mountains National Bank, 2 Colo. 249; First National Bank, 23 Ohio St. 97; Farmington Savings Bank 71 Me. 49; Lester v. Howard Bank, 33 Md. 558; Richmond Bank v. Robinson, 42 Me. 589.

Taylor on Corporations, § 302; National Bank v. Whitney, 103 U. S. 161; Crocker v. Whitney, 71 N. Y. 161; National Bank v. Matthews, 621, 626 et seq.; Oldham v. First National Bank, 85 N. C. 240; v. National Exchange Bank, 71 Mo. 221; Graham v. National Bank, 10 N. J. Eq. 804; Winton v. Little, 94 Pa. St. 64.

4. Proceedings by the attorney-general.

Proceedings cannot be maintained by the attorney-general to restrain a corporation from doing *ultra vires* acts which are acquiesced in by all the shareholders, and are not injurious to the rights of shareholders, unless they be shown to be illegal, that constitute a contravention of some statute, or *mala per se* against public policy;¹ as, for example, where a railroad is acquiring a monopoly of the trade of 'a certain district,'² or in cases of public nuisance such as affect or endanger the public health or convenience and require immediate interposition.³ Otherwise the proper process is by *quo warranto* to oust the corporation of its franchises.⁴

Attorney-General v. Tudor Ice Co. 104 Mass. 237; 6 Am. Rep. 227, and cases there reviewed at length; United States v. Union Pacific R. Co. 160 U. S. 1.

R. R. Co. 98 U. S. 569; *Attorney-General v. Utica Ins. Co.* 2 Johns. C. 371, and authorities there reviewed; *Attorney-General v. Great Eastern Ry. Co.* 11 Ch. Div. 449; *Attorney-General v. Cockerhouth Local Board* 18 Eq. 172. See 11 Ch. Div. 470; *Attorney-General v. Reynolds* (L. Cas. Abr. 3d ed.) 131; *Browne & Theobald's Railway Law*, 97. *Cons. Hare v. London etc. Ry. Co.* 2 Johns. & H. 80, 111; *Liverpool v. Chas. Water Works Co.* 2 De Gez. M. & G. 852, 860; *Ware v. Regent's Canal Co.* 3 De Gez. & J. 212, 228; which, however, are declared mere dicta in *Attorney-General v. Tudor Ice Co.* 104 Mass. 237; 6 Am. Rep. 237.

2 *Attorney-General v. Great Northern Ry. Co.* 1 Drew. & S. 154.

3 *District-Attorney v. Lynn etc. R. R. Co.* 16 Gray, 242; *Attorney-General v. Cambridge*, 16 Gray, 553; *Attorney-General v. Boston Wharf Co.* 12 Gray, 553; *Rowe Granite Co. v. Bridge Co.* 31 Pick. 344, 347; *Attorney-General v. Shrewsbury Bridge Co.* 21 Ch. Div. 722; *Browne & Theobald's Railway Law*, 97.

4 *People v. Utica Ins. Co.* 15 Johns. (N. Y.) 338; *Attorney-General v. Tudor Ice Co.* 104 Mass. 237; 6 Am. Rep. 237.

CONSOLIDATION AND MERGER.

CHAPTER XXI.

OF CONSOLIDATION AND MERGER,

AND HEREIN OF LEASE, AND SALE.

Introductory.

Express legislative authority requisite to valid consolidation.

Public policy adverse to consolidation of competing railways.

The New York statute authorizing consolidation—General provisions.

The manner of effecting consolidation under the New York statute.

The rights of dissenting shareholders.

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The effect of consolidation—(a.) Upon the existence of the original companies.

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(e.) Upon municipal subscriptions.

(f.) Upon pending litigation.

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(h.) Upon the rights, privileges and immunities of the original companies.

The same subject, continued and illustrated.

(i.) Upon exemption from taxation.

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The same subject, continued—Continuing obligations and personal obligations.

- § 558. Provisions of the English statute concerning the completion of works begun by the dissolved company.
- § 559. (k.) Upon liability for torts.
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- § 570. Of the effect of an unauthorized lease upon liability for torts.
- § 571. Of the recovery of rent upon an *ultra vires* lease.
- § 572. Of sale.

§ 535. **Introductory.**—There has been considerable discussion as to the meaning of the words consolidation, merger and amalgamation. The only practical object, however, of these discussions seems to be, in ascertaining whether the existence of one or both of the original companies is extinguished or continued, and in determining other questions respecting the legal relations arising from the modification or dissolution of the corporate being.¹ These questions, however, turn mainly upon the wording of the statutes or charters, whereby the change is authorized. “In general, it may be said that by a consolidation, merger, or amalgamation, either two corporations are dissolved and a new one formed therefrom, or one is dissolved and its property and franchises are taken up by another.”² The word “amalgamation” is peculiarly English; and it is said that “nobody really knows what ‘amalgamation’ means.”³ It would seem, how-

r, to involve, (1) a destruction, either actually dissolution, or substantially by abeyance, of the identity of the original or transforming corporations; a transfer of corporate rights and liabilities out and out, present and contingent, a transfer, in short, of the legal corporate *persona*; (3) a transmutation of the members of the former corporation into members of the latter; (4) a novation of the rights of creditors of the former corporation, so that their rights and claims against it are gone, and, instead, the latter corporation is their debtor.⁴ Although it has been said by an eminent authority that the word "amalgamation" as used in the English law has a wider meaning than "consolidation" in America; that the word "consolidation" would be inapplicable to a union of two or more companies in such a way that one of the original corporations only was continued in existence while the others were merged or absorbed into it; and that an absorption of one company by another, according to some of the decisions, would be an amalgamation in England, but not a consolidation in America,⁵ it will nevertheless be found upon examination of many of the American cases cited in the following sections, that the word "consolidation" is frequently used in this country with reference to just such an absorption of one company by another, as is denoted by the English term "amalgamation." Accordingly, the word "consolidation" will be used in this chapter to denote any conjunction or union of the stock, property or franchises of two or more corporations, whereby the conduct of their affairs is permanently, or for a long period of time, placed under one management, wheth-

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er the agreement between them be by lease, sale, or other form of contract, and whether its effect be the dissolution of neither of the companies, or whether one of them be dissolved and its existence be merged in the corporate being of the other, or whether it result in the dissolution of both companies and the creation of a new corporation out of such portions of the original companies as enter into the new.⁶ In pleading consolidation, it is sufficient to state that the constituent companies, naming them, were authorized by law to consolidate, and that having done so, they have become one corporation under a certain name.⁷

1 Cook on Stock & Stockh. § 663.

2 Cook on Stock & Stockh. § 663.

3 Dongan's Case, 28 Law T. N. S. 60.

4 Green's Brice's *Ultra Vires*, p. 608; In re Bank of Hindostan, 2 Hem. & M. 663.

5 Green's Brice's *Ultra Vires* (2nd ed.), 631.

6 In a recent well-considered case, construing the Nebraska Constitution (art. xi, § 3,) which declares, that "no railroad corporation or telegraph company shall consolidate its stock, property, franchises or earnings, in whole or in part," with parallel or competing lines, it was held that the word "consolidate" was used in the sense of "join" or "unite," and that the law was not to be evaded by the substitution of a lease for a deed of conveyance: *State v. Atchison etc. R. R. Co.* 4 E'y & Corp. Law J. 83, 91. But a temporary co-operation under one management is not a consolidation: *Archer v. Terre Haute etc. R. R. Co.* 162 Ill. 592; S. C. 7 Am. & Eng. R. R. Cas. 219; and a mere alliance with respect to traffic does not amount to an amalgamation: *Shrewsbury etc. R'y Co. v. Stour Valley R'y Co.* 2 D. & G. 866; *Midland Great Western R'y Co. v. Leech*, 3 H. L. Cas. 872. That "consolidation" may be effected by the sale of the stock of one company to another, see *Hill v. Nisbet*, 100 Ind. 311. Another case declares consolidation to be "a surrender of the old charters by the companies, the acceptance thereof by the legislature, and the new formation of a new corporation, out of such portions of the old as enter into the new": *State v. Bailey*, 16 Ind. 46, 51; 70 Am. Dec. 425, citing *Leuman v. Lebanon Valley R. R. Co.* 30 Pa. St. 42; 72 Am. Dec. 685. Cf. *McMahon v. Morrison*, 16 Ind. 172; 70 Am. Dec. 413. See *Clearwater v. Meredith*, 1 Wall. 25, 40.

7 *Collins v. Chicago etc. R. R. Co.* 14 Wis. 492.

§ 536. **Express legislative authority requisite to valid consolidation.**—Express legislative authority is requisite to enable corporations to effect

a valid consolidation.¹ Corporations are not such "persons" as are authorized to form other corporations.² Nor can one corporation occupy the relation of "employer" to another.³ Railway companies, being chartered to perform public duties, cannot evade their obligations to the public by a transfer of their franchises, either by lease, sale, or consolidation, without express legislative sanction.⁴ Authority granted by statute to one corporation, however, to consolidate with "any other" company, is an implied grant of authority to any other to enter into the consolidation, unless for some reason it be incapable of so doing.⁵ The requisite legislative sanction may be given either by charter or by a special enabling act, or by a general law of the State. But general statutes authorizing the consolidation of corporations are not retroactive, and do not apply to companies chartered prior to their enactment.⁶ An authorized consolidation may be, however, cured by special subsequent enactment.⁷

1 *Pearce v. Madison etc. R. R.* 21 How. 442; *Clearwater v. Meredith*, 1 Wall. 25; *New York etc. Canal Co. v. Fulton Bank*, 7 Wend. 415; *State v. Maine Central R. R. Co.* 66 Me. 488; *Bishop v. Brainerd*, 28 Conn. 289; *Lauman v. Lebanon Valley R. R. Co.* 30 Pa. St. 42; 72 Am. Dec. 685; *State v. Bailey*, 16 Ind. 46; 79 Am. Dec. 405. Cf. *Black v. Delaware etc. Canal Co.* 24 N. J. Eq. 455; *In re Era Assurance Soc.* 30 Law J. Eq. 137.

2 *Factors' etc. Ins. Co. v. New Harbor Protection Co.* 37 La. An. 233.

3 *Dukes v. Love*, 97 Ind. 341.

4 *Thomas v. The Railroad Co.* 110 U. S. 71; *Pearce v. Madison etc. R. R. Co.* 21 How. 441; *Pullan v. Cincinnati etc. R. R. Co.* 4 Biss. 35; *Mowrey v. Indianapolis etc. R. R. Co.* 4 Biss. 78; *American Union Tel. Co. v. Union Pacific R'y Co.* 1 Macrary, 108; *Troy etc. R. R. Co. v. Boston etc. R. R. Co.* 86 N. Y. 107; *Abbott v. Johnston etc. Horse R. R. Co.* 80 N. Y. 27; 36 Am. Rep. 572; *Middlesex etc. R. R. Co. v. Boston etc. R. R. Co.* 115 Mass. 347; *Richardson v. Sibley*, 11 Allen, 65; 87 Am. Dec. 700; *Commonwealth v. Smith*, 10 Allen, 448; 87 Am. Dec. 672; *Black v. Delaware etc. Canal Co.* 24 N. J. Eq. 456; *Stewart's Appeal*, 56 Pa. St. 413; *Wood v. Bedford etc. R. R. Co.* 8 Phila. 94; *State v. Sherman*, 22 Ohio St. 411, 428; *Tippecanoe County v. Lafayette etc. R. R. Co.* 50 Ind. 85; *Peoria etc. R'y Co. v. Coal Valley Manuf. Co.* 68 Ill. 489. *Ex parte Williamson*, Law R. 5 Ch. 309; *East Anglian R'y Co. v. Eastern Counties R'y Co.* 11 Com. B.

775; *Chambers v. Manchester etc. R'y Co.* 5 Best & Smith, 53; *Winn v. Birkenhead etc. R'y Co.* 5 De Gex & S. 562; *McGregor v. Dover etc. Ry.* Jur. 21; *London etc. R'y Co. v. London etc. R'y Co.* 5 Jur. N. S. 801.

5 *In re Prospect Park etc. R. R. Co.* 67 N. Y. 371.

6 *Hatcher v. Toledo etc. R. R. Co.* 62 Ill. 477, 480.

7 *Mead v. New York etc. R. R. Co.* 45 Conn. 199; *Bishop v. Braintree* 28 Conn. 289; *McAuley v. Columbus etc. R'y Co.* 83 Ill. 352.

§ 537. **Public policy adverse to consolidation of competing railways.**—The public policy of most of the American commonwealths is adverse to the consolidation of parallel or competing railways. In New York it is enacted that no companies or corporations of that State whose railroads run on parallel or competing lines shall be authorized by the act to merge or consolidate.² Prohibitions against "consolidation" are used in the broadest sense, as an absolute inhibition of any joining or uniting of stock, property, franchises or earnings in whole or in part, by companies owning parallel or competing lines.³ In statutes providing for the consolidation of railways which are "constructed so as to permit the passage of burden or passenger cars over any two or more such roads *continuously* without break of gauge or interruption," the word "continuously" is construed to be restrictive, and exclusive of parallel or competing lines.⁴ With respect to connecting or intersecting railways, however, so located as not to be natural competitors for the business of the same district of country, there is generally no principle of public policy rendering their consolidation invalid.⁵ The public policy of the State of New York, as manifested by numerous acts of the legislature, has always been not only to afford the fullest scope for the consolidation and reorganization of non-com-

ing railroads and railroad corporations, but also the transfer of the use of such roads and their franchises by one corporation to another.⁶ When corporations are allowed by law to consolidate, public policy does not oppose the organization of a corporation with the ulterior purpose of consolidating with another.⁷

State v. Atchison etc. R. R. Co. 24 Neb. 143; 4 R'y & Corp. Law

N. Y. Laws of 1869, ch. 917, § 9.

State v. Atchison etc. R. R. Co. 24 Neb. 143; 4 R'y & Corp. Law 8, 91, construing Neb. Const. art. xi, § 3. In the foregoing case, the prohibition was held to extend to leases of parallel or competing lines.

State v. Vanderbilt, 37 Ohio St. 590.

State v. Atchison etc. R. R. Co. 24 Neb. 143; 4 R'y & Corp. Law 8, 83, citing *State v. Vanderbilt*, 37 Ohio St. 590, construing a similar statute in Ohio, where it was held that two roads running parallel and reach each other for sixty miles, had no authority to consolidate.

Woodruff v. Erie etc. R'y. Co. 93 N. Y. 615; *State v. Vanderbilt*, 37 Ohio St. 590; *State v. Atchison etc. R. R. Co.* 24 Neb. 143; 4 R'y & Corp. Law J. 86; *Hill v. Nisbet*, 100 Ind. 311.

Woodruff v. Erie R'y Co. 93 N. Y. 603, 615.

Hill v. Nisbet, 100 Ind. 311.

§ 538. **The New York statute authorizing consolidation—General provisions.**—In any case where two or more railroad companies shall have been, or shall hereafter be, organized under the laws of New York, the whole of whose lines, as operated by them, respectively, form one continuous and connecting line of road, they are authorized by the statute to consolidate their road, stock, franchises and property, according to the existing laws of the State relating to the consolidation of railroad companies; and any such consolidated company may thereupon construct or finish the construction of that continuous line of railroad, and operate it subject to all provisions of law applicable to railroad corporations organized

under the laws, so far as not inconsistent with the act; but it is provided that this act shall not in any manner affect the existing laws regulating the rate of fare on any railroad.¹ It is further provided that suits may be brought and maintained against the new corporation in the courts of the State, for all causes of action, in the same manner as against other railroad corporations therein;² and the General Railroad Act of the State³ is made applicable to the new corporations formed under the consolidation act.⁴

1 N. Y. Laws of 1875, ch. 103, § 1, as amended by N. Y. Laws of 1883, ch. 387.

2 N. Y. Laws of 1869, ch. 917, § 5.

3 N. Y. Laws of 1850, ch. 140.

4 N. Y. Laws of 1869, ch. 917, § 8.

§ 539. The manner of effecting consolidation under the New York statute.—The New York statute authorizing the consolidation of certain railroads, provides that the directors of the companies proposing to consolidate may enter into a joint agreement under the corporate seal of each company, for the consolidation of those companies and railroads, and prescribing the terms and conditions thereof;¹ that this agreement shall be submitted to the stockholders of each of the companies at a meeting thereof, called separately, for the purpose of taking the agreement into consideration;² that due notice of the time and place of holding the meeting, and the object thereof, shall be given by each company to its stockholders, by written or printed notices addressed to each of the persons in whose names the capital stock of the company stands on the books thereof, and delivered

to those persons respectively, or sent to them by mail when their post-office address is known to the company, at least thirty days before the time of holding the meeting, and also by a general notice published daily, for at least four weeks, in some newspaper printed in the city, town or county where the company has its principal office or place of business;³ that, at the meeting of the stockholders the agreement of the directors shall be considered, and a vote by ballot taken for its adoption or rejection, each share entitling the holder thereof to one vote, the ballots to be cast in person or by proxy; and if two-thirds of all the votes of all the stockholders shall be for the adoption of the agreement, then the fact shall be certified upon the agreement by the secretaries of the respective companies, under the corporate seal; and that the agreement so adopted, or a certified copy thereof, shall be filed in the office of the secretary of State, and shall from thence be deemed and taken to be the agreement and act of consolidation of those companies.⁴ The act further provides, that upon making and perfecting the agreement and act of consolidation as thereinbefore provided, and filing the same or a copy thereof in the office of the secretary of State as aforesaid, the corporations, parties thereto, shall be deemed and taken to be one corporation by the name provided in the agreement and act; but that the act of consolidation shall not release the new corporation from any of the restrictions, disabilities or duties of the several corporations so consolidated.⁵ A copy of that agreement and act of consolidation, duly certified by the secretary of State, under his

v. Financial Corporation, Law R. 5 Eq. 401; *In re Empire Assurance Co.* Law R. 4 Eq. 341; *Winch v. Birkenhead etc.* R'y Co. 5 De Gex & S. 562; *McDonnell v. Grand Canal Co.* 3 Ir. Ch. N. S. 578; *Bryson v. Warwick etc.* Co. 1 Smale & G. 447; *Charlton v. Newcastle etc.* R'y Co. 5 Jur. N. S. 1393; *Dongan's Case*, 23 Law T. N. S. 60. But see *Lauman v. Lebanon Valley R. R. Co.* 30 Pa. St. 42; 72 Am. Dec. 635; *State v. Bailey*, 16 Ind. 45; 70 Am. Dec. 45. *Cf. Mills v. Central R. R. Co.* 41 N. J. Eq. 1; *Trask v. Peekskill etc. Works*, 6 Hun, 236.

2 *Kean v. Johnson*, 9 N. J. Eq. 401, 407.

3 *Mills v. Central R. R. Co.* 41 N. J. Eq. 1, 13. *Cf. Canada Southern R'y Co. v. Gebhard*, 109 U. S. 527; *Middleton v. Boston etc. R. R. Co.* 53 Conn. 351; *Gates v. Boston etc. R. R. Co.* 53 Conn. 333.

4 *Clearwater v. Meredith*, 1 Wall. 25, 39. *Acc. Knoxville v. Knoxville etc. R. R. Co.* 22 Fed. Rep. 758. *Cf. March v. Eastern R. R. Co.* 43 N. H. 515; 8 U. 40 N. H. 548; 77 Am. Dec. 732.

5 *Bates County v. Winters*, 112 U. S. 325; *Nugent v. Supervisors*, 19 Wall. 241; *Woodruff v. Erie R'y Co.* 98 N. Y. 609; *Troy etc. R. R. Co. v. Boston etc. R. R. Co.* 86 N. Y. 107; *Abbott v. Johnstown etc. R. R. Co.* 80 N. Y. 27; 36 Am. Rep. 572; *Middletown v. Boston etc. R. R. Co.* 53 Conn. 351; *Gates v. Boston etc. R. R. Co.* 53 Conn. 333, where the requisite majority was three-fourths; *Bish v. Johnson*, 21 Ind. 239; *Sparrow v. Evansville etc. R. R. Co.* 7 Ind. 369; *Niantic Savings Bank v. Town of Douglas*, 5 Bradw. 579; *Simpson v. Denison*, 10 Hare, 51, 56; *Cook on Stock & Stockh.* § 670.

6 *Taylor on Corporations*, § 536; *International etc. R. R. Co. v. Bremond*, 53 Tex. 96.

7 *In re Bank of Hindustan*, Law R. 16 Eq. 417.

8 *Wood's Railway Law*, 1686, citing *Philadelphia etc. R. R. Co. v. Catawissa R. R. Co.* 53 Pa. St. 20; *McCray v. Junction R. R. Co.* 9 Ind. 363. But see *Cork etc. R'y Co. v. Paterson*, 18 Com. B. 414.

§ 541. Of condemnation and sale of stock of dissenting shareholders.—It is not within the power of courts of law or equity to decree that the stock of shareholders dissenting from a plan of consolidation shall be condemned, appraised and sold, for the purpose of quieting factious opposition.¹ But the legislature may, by virtue of the State's sovereign power of eminent domain, which extends not only to real, but also to personal property, provide, in the statute authorizing consolidation, lease, or sale, that dissenting shareholders' stock shall be appraised and condemned.² Such statutes, however, are strictly construed, and accordingly it has been decided that authority to condemn for the purpose of consolidation is no

lature never intended to compel a dissenting shareholder to transfer his interest because a majority of the stockholders consented to the consolidation, and that even if the legislature had manifested an obvious purpose to do so, the act would have been illegal, for it would have impaired the obligation of a contract.⁴ Where, however, an existing statute or the charter of the corporation expressly authorizes a lease or sale, purchasers of the property are presumed to have bought in contemplation of a possible transfer of the property, and a majority vote of the stockholders is sufficient to authorize a sale or lease upon the most disadvantageous terms, dissenting stockholders having no voice, unless fraud can be proven.⁵ When a consolidation is effected wrongfully, and against the objection of a shareholder who has partially paid up his shares, the consolidated company is liable to him for the value of them.⁶ When an unauthorized consolidation is annulled, the shareholders of the original consolidated corporation may recover the amounts paid in by them.⁷ The holders of stock in the original companies are not *ipso facto* stockholders in the consolidated company, but only have the right to become so by surrendering their old

Worcester v. Meredith, 1 Wall. 40; *Mowray v. Indianapolis etc. R. R.*, 78; *Cass v. Manchester etc. Co.* 9 Fed. Rep. 640; *Case of Atlantic R. Co.* 3 Hughes, 320; 4 Hughes N. S. 151; *Gardner v. Hammons Co.* 33 N. Y. 421; *Blatchford v. Ross*, 31 Barb. 42; *Stevens v. Cratt*, 819; 98 Am. Dec. 697; *South Georgia etc. R. R. Co. v. Ga.* 230; *International etc. R. R. Co. v. Bremond*, 53 *Hamilton etc. Ins. Co. v. Hobart*, 2 Gray, 543; *Boston etc. v. New England etc. R. R. Co.* 13 R. I. 260; *Stevens etc. R. R. Co.* 29 Vt. 545; *Terhune v. Midland R. R. Co.* 33 23; *New Jersey Midland R'y Co. v. Strait*, 33 N. J. 325; *Black etc. Canal Co.* 24 N. J. Eq. 455, reversing 23 N. J. Eq. 139; *Hackensack etc. R. R. Co.* 18 N. J. Eq. 178; 90 Am. Dec. 617; *Hanson*, 9 N. J. Eq. 401; *Tippecanoe County v. Lafayette etc. R. R.* 85; *Tuttle v. Michigan etc. R. R. Co.* 35 Mich. 247; *Clinch*

original corporations, and at the same instant the creation of a new corporation, with property, powers, liabilities, and stockholders, derived from those passing out of existence¹ Consolidation does not necessarily, however, work a dissolution of both² or of either of the original companies.³ It may be that the consolidation of two corporations, or amalgamation, as it is called in England, if full and complete, may work a dissolution of them both, and its effect may be the creation of a new corporation. Whether such be the effect or not, must depend upon the statute under which the consolidation takes place, and upon the intention therein manifested. If, in the statute, there be no words of grant of corporate powers, it is difficult to see how a new corporation is created. If it is, it must be by implication; and it is an unbending rule that a grant of corporate existence is never implied. In the construction of a statute every presumption is against it.⁴ There are numerous cases where a consolidated company has been held liable for the debts of the old companies; and where it has been held to possess the rights of the old companies; but this does not necessarily imply a surrender of all the old charters.⁵ Even when for all other purposes the original corporations have been dissolved by a consolidation, there remains a qualified existence for the purpose of winding up its affairs.⁶

1 *Pullman Palace Car Co. v. Missouri Pacific R'y Co.* 115 U. S. 587, 594; *Louisville etc. R. R. Co. v. Palmes*, 109 U. S. 244; *Railroad Co. v. Georgia*, 91 U. S. 359, 364; *Railroad Co. v. Maine*, 96 U. S. 499, 518; *Shields v. Ohio*, 55 U. S. 319, 320; *Philadelphia etc. R. R. Co. v. Maryland*, 10 How. 376, 383; *Ridgway Township v. Griswold*, 1 McCrary, 151; *Clearwater v. Meredith*, 1 Wall. 25, 40, 42; *Lightner v. Boston etc. R. R. Co.* 1 Low. 338; *Indianola R. R. Co. v. Fryer*, 56 Tex. 609, 616; *Cheraw etc. R. R. Co. v. Commissioners*, 83 N. C. 519; *Meyer v. Johnston*, 53 Ala. 237; *S. C. 64 Ala. 603*; *Miller v. Lancaster*, 5 Cold. 514; *Columbus etc. R. R. Co. v. Powell*, 40 Ind. 37; *Indianapolis etc. R. R. Co. v. Jones*, 29 Ind. 465; 95 Am. Dec.

ent for such proceedings against a shareholder
ating from a lease.³

Hills v. Central B. R. Co. 41 N. J. Eq. 1.

Lack v. Delaware etc. Canal Co. 24 N. J. Eq. 455, reversing 22 N.
30, under the act of March 17, 1870; Cook on Stock & Stockh.
Cf. Trask v. Peekskill etc. Works, 6 Hun, 236; N. Y. Laws of 1867,
; *Lauman v. Lebanon Valley R. R. Co.* 30 Pa. St. 42; 72 Am.
5.

Hills v. Central B. R. Co. 41 N. J. Eq. 1.

**42. Whether corporate creditors may enjoin
nsolidation.**—As a general rule corporate
tors have no standing in court to object to
consolidation of the debtor company with
corporations, for their claims remain a lien
the property of the company after consoli-
n as before, and since they are in no wise con-
ned to relinquish their liens and accept in
thereof the personal liability of the new com-
. It would seem, however, that when the
olidation evidently imperils the security of
orate creditors, and no provision is made for
payment of the debts of the original com-
es, the creditors may prevent the consolida-
at least until their rights have been secured.²

Powell v. North Missouri R. R. Co. 42 Mo. 63. Thus, of course, a
ge lien may be enforced against property covered by it, after the
dation: *Eaton etc. R. R. Co. v. Hunt*, 20 Ind. 467. See *Racine etc.*
Co. v. Farmer's Loan and Trust Co. 49 Ill. 331; 95 Am. Dec. 595.
se, a maritime lien on a vessel remains after the consolidation of
orporation owning the vessel: *The Key City*, 14 Wall, 653; *In re*
es. etc. Assoc. Law R. 9 Eq. 643; *In re India etc. Assurance Co.*
. 7 Ch. 651; *Griffith's Case*, Law R. 6 Ch. 374; *In re Family Endow-*
oc. Law R. 5 Ch. 118.

Booth v. Buace, 33 N. Y. 139; 18 Am. Dec. 372; *Barclay v. Quick-*
Mining Co. 9 Abb. Pr. N. S. 23. *Cf. Kelly v. Mariposa Co.* 4
32.

**43. The effect of consolidation—(a.) Upon the
tence of the original companies.**—The effect
consolidation is generally a dissolution of the,

§ 545. (c). **Upon tenure of office of officers and employees—The English statute.** — Under the English Railways' Clauses Act of 1863, all clerks, officers and servants, who at the time of amalgamation are in the employment of the dissolved company, thereupon become clerks, officers, or servants, as the case may be, of the amalgamated company, with the same rights, and subject to the same obligations and incidents in respect of their employment as they would have had, or would have been subject to, as the clerks, officers, or servants of the dissolved company; and they continue in office or employment until duly removed by the amalgamated company, or until the terms of their employment are duly altered by the latter.¹

1 26 & 27 Vict. ch. 92, § 49.

§ 546. (d). **Upon calls and subscriptions.** — Calls made by the original companies, remaining unpaid at the time of consolidation, are payable to the consolidated corporations, and may be enforced by the latter as if originally made by it.¹ And the consolidated company cannot release a subscriber to one of the original companies from his liability to corporate creditors by acquiescing in a device whereby he seeks to evade it.² But unless a sale or consolidation be authorized, the purchasing or consolidated company cannot enforce the payment of calls on subscriptions to the stock of the former;³ for an unauthorized sale or consolidation releases subscribers to the capital stock of the companies.⁴ And although a consolidation be authorized, yet, if the enabling act was passed after the making of a subscription, a dissenting

scriber is discharged from liability upon his tract.⁵ On the other hand, it follows, of course, that where consolidation had been already authorized by charter or statute at the time the subscriber agreed to take stock in the original company, he will not be released by the fact that the company has availed itself of that privilege;⁶ unless the consolidation results in a radical change the purpose for which the company, to whose stock he subscribed, was incorporated.⁷

Vide cases cited infra. This is expressly enacted in England, 26 & 27 Vict. ch. 92, § 52.

Bouton v. Dement, 123 Ill. 142.

Thrasher v. Pike County R. R. Co. 25 Ill. 393.

Shelbyville etc. Turnpike Co. v. Barnes, 42 Ind. 498; *State v. Bailey*, d. 46; 79 Am. Dec. 405; *McCray v. Junction R. R. Co.* 9 Ind. 358.

Harshman v. Bates County, 92 U. S. 569; *Martin v. Junction R. R.* 2 Ind. 685; *McCray v. Junction R. R. Co.* 9 Ind. 358.

Mansfield etc. R. R. Co. v. Brown, 26 Ohio St. 233; *Bish v. Johnson*, d. 299; *Hanna v. Cincinnati etc. R. R. Co.* 20 Ind. 30; *Sprague v. Erie R. R. Co.* 19 Ill. 174. See *Bishop v. Brainerd*, 28 Conn. 289. *Mansfield etc. R. R. Co. v. Stout*, 26 Ohio St. 241; *Illinois River R. R. Co. v. Zimmer*, 20 Ill. 654.

Illinois Grand Trunk R. R. v. Cook, 29 Ill. 237.

547. (c). Upon municipal subscriptions.—While the consolidation of railway companies, to which a municipal subscription has been made, does not necessarily render the making of such subscription by the municipal officers an unauthorized act, nor impair the right of the company to receive payment thereof when actually made,¹ dissenting tax-payers may object to the payment, if the consolidation materially alters the plan of the enterprise to which the aid was originally given; and they will not be estopped by any contract or acquiescence therein by the municipal authorities,² unless the consolidation was made under

authority existing at the time the vote in favor of subscription was taken.¹

1 That a subscription to one of the original corporations may be paid to the consolidated company, see *Chicaming v Carpenter*, 108 U. S. 623; *New England v. B. & N. O.*, 113 U. S. 73; *Nugent v. Supervisors*, 19 Wall. 261; *N. J. v. N. J. v. Douglas*, 5 Ill. App. 579; *Harter v. Kernochan*, 101 U. S. 1; *County of Tipton v. Locomotive Works*, 143 U. S. 527; *Metcalf v. H. & C.*, 12 U. S. 81; *County of Cam v. Gilet*, 100 U. S. 321; *W. & A. v. H. & C.*, 10 U. S. 499; *County of Schuyler v. Thomas*, 90 U. S. 1; *County of Schuyler v. Nicolay*, 93 U. S. 619; *County of Kent v. Thomas*, 90 U. S. 1; *County of East Lincoln v. Davenport*, 94 U. S. 301; *Centra. Harb. v. Lutes County*, 92 U. S. 52.

2 *Clearwater v. Meredith*, 1 Wall. 40; *McMahon v. Morrison*, 16 Ind. 172; 79 Am. Dec. 418; *State v. Nebraska County*, 10 Kan. 569.

3 *Manfield etc. R. R. Co. v. Brown*, 26 Ohio St. 221; *Sparrow v. Evansville etc. R. R. Co.*, 7 Ind. 369.

§ 548. (7). Upon pending litigation.—The consolidation of two or more companies does not abate a pending action to which any of them may be a party.¹ Even though the consolidation may be accompanied by a change of name of the company engaged in the litigation,² and a dissolution of its corporate existence, its existence continues for the purpose of the suit.³ The legislature has no power to authorize it, nor can the corporation act under legislative sanction, so as to defeat or prejudice the rights of plaintiffs in pending suits against it. As to such actions, the corporation exists for the purpose of judgment; and as to them it has not lost its individuality or identity. For no act of a defendant can defeat the rights of a plaintiff. As at common law, a *feme sole* defendant marrying after suit brought, though she lost her identity, changed her name, and merged her separate existence in that of her husband, it was not necessary that the plaintiff should take any notice thereof. He was entitled to judgment against her by her former name.⁴ But to obtain a judg-

it against the consolidated company itself, it
it be substituted as defendant.⁵

Shackleford v. Mississippi Central R. R. Co. 52 Miss. 159; *East Tennessee etc. R. R. Co. v. Evans*, 6 Heisk. 607; *Baltimore etc. R. R. Co. v. Elman*, 2 Grant's Cas. (Pa.) 348. *Cf. Prouty v. Lake Shore etc. R'y* 2 N. Y. 363.

East Tennessee etc. R. R. Co. v. Evans, 6 Heisk. 607.

East Tennessee etc. R. R. Co. v. Evans, 6 Heisk. 607; *Shackleford v. Mississippi Central R. R. Co.* 52 Miss. 159; *Baltimore etc. R. R. Co. v. Elman*, 2 Grant Cas. (Pa.) 348. See *Bruffet v. Great Western R. R.* 5 Ill. 353, 357. See, however, *Indianola R. R. Co. v. Fryer*, 5 Tex. 35. As to substitution of the consolidated corporation as party defendant in the consolidation has wrought a dissolution of the original defendant.

Shackleford v. Mississippi Central R. R. Co. 52 Miss. 159.

Prouty v. Lake Shore etc. R'y Co. 52 N. Y. 363; *Selma etc. R. R. Co. v. Croin*, 40 Ga. 706. *Cf. Ketcham v. Madison etc. R. R. Co.* 20 Ind. 260.

549. The same subject, continued—The New York and English statutes.—In New York it is enacted that no suit, action, or other proceeding now pending before any court or tribunal, in which either the railway companies is a party, shall be deemed to have abated or to have been discontinued by the effect and act of consolidation, but may be conducted in the name of the existing corporations until final judgment, or the new corporation may be, by order of the court, on motion, substituted as a party.¹ (A similar statute in New York has been held to apply as well to actions pending in the federal courts as to those pending in the courts of the State.)² This, also, is the English law under the Railways' Clauses Act of 1863, both as to litigation and arbitration; and all judgments of the courts and awards of arbitrators may be enforced by or against the amalgamated company, either solely, or, as the case may require, jointly with the other company.³ Under this statute, the amalgamated company may carry on actions instituted by the

dissolved company, without any order or suggestion on the record.⁴ And all persons committing offenses against any of the provisions of any special act relating to the dissolved company, before the amalgamation, may be prosecuted, and all penalties incurred by reason of such offenses may be sued for and recovered, in like manner and in all respects as if the amalgamating act had not been passed—the amalgamated company being, in respect of all such matters, considered as identical with the dissolved company.⁵

1 N. Y. Laws of 1869, ch. 917, § 5.

2 *Elison Electric Light Co. v. Westinghouse* (U. S. District Court of N. J. 1888), 4 R'y & Corp. Law J. 423, construing N. Y. Laws of 1834, ch. 307, and citing *Central R. R. Co. v. Georgia*, 92 U. S. 665; *Bank v. Colby*, 21 Wall. 611.

3 26 & 27 Vict. ch. 92, §§ 43, 44.

4 *West Hartlepool etc. R'y Co. v. Jackson*, 36 Law J. Ch. 189; *Browne & Theobald's Railway Law*, 470.

5 26 & 27 Vict. ch. 92, § 43.

§ 550. (*a.*) **Upon choses in action.**—The consolidated company may sue in its own name upon the *choses in action* of the constituent corporations.¹ It may compromise claims against the original companies, and enforce the settlements agreed upon.² The law upon this subject has been ably codified in England by the Railways' Clauses Act of 1863, which enacts that “except as may be otherwise provided in the special act, all debts and money due from or to the dissolved company, or any persons on their behalf, shall be payable and paid by or to the amalgamated company;³ that all tolls, rates, duties and money due or payable by virtue of any act relating to the dissolved company, from or to that company, shall be due and payable from or to the amalgamated company, and shall be re-

able from or by the amalgamated company, the same ways and means and subject to the same conditions as the same would or might have been recoverable from or by the dissolved company if the amalgamating act had not been passed;¹ that deeds, conveyances, grants, assignments, leases, mortgages, sales, mortgages, bonds, covenants and other securities, which before the amalgamation have been executed, made or entered into by, with, or in relation to the dissolved company or the directors thereof, and which are in force at the time of the amalgamation, and all obligations and liabilities incurred before the amalgamation have been incurred by or for, or which but for the amalgamation might or would have arisen in relation to the dissolved company, or the directors thereof, shall be as valid and of as full effect in favor of, against or in relation to the amalgamated company, as if the same had been executed, made or entered into by, with, or in relation to, or had been incurred by or for had arisen in relation to, the amalgamated company by name;² that all causes and rights of action or suit accrued before the time of amalgamation, and then in any manner enforceable by, or against the dissolved company, shall be and remain as good, valid and effectual for or against the amalgamated company as they would or might have been for or against the dissolved company affected thereby, if the amalgamating act had not been passed.³

And only in its own name; *Indianola R. R. Co. v. Fryer*, 58 Tex. 241; *University of Vermont etc. v. Baxter's Estate*, 62 Vt. 99.

Paine v. Lake Erie etc. R. R. Co. 36 Ind. 262.

26 & 27 Vict. ch. 92, § 40.

26 & 27 Vict. ch. 92, § 42.

26 & 27 Vict. ch. 92, § 41.

26 & 27 Vict. ch. 92, § 42.

§ 551. Provisions of the English statute concerning contracts for the purchase of land.—In England, if the dissolved company has under any special act entered into any contract for the purchase of lands, or has taken or used any lands which at the time of amalgamation have not been effectually conveyed to the dissolved company, or the purchase-money of which has not been duly paid by the dissolved company, the Railways' Clauses Act of 1863 directs that the contract, if in force at the time of amalgamation, shall thereafter be completed by the amalgamated company, that the lands shall be conveyed as the amalgamated company may direct, and that the purchase-money shall be paid and applied pursuant to the special acts relating to the dissolved company, those acts being read and construed in relation to the completion of the contract and the purchase and conveyance of the lands, and the payment and application of the purchase-money, as if the amalgamated company were the one named in the acts and contract.¹ By the same statute it is enacted that all matters to be done, continued or completed, or which but for the amalgamation would, might or could be done, continued or completed by the dissolved company, or their directors, officers or servants, under or by virtue of any special acts, shall or may be done, continued or completed by the amalgamated company and their directors, officers and servants, as the case may be.²

¹ 26 & 27 Vict. ch. 92, § 46.

² 26 & 27 Vict. ch. 92, § 39.

§ 552. Provisions of the English statute concerning the records of the dissolved company.—All officers and persons having in their possession

at the time of amalgamation, any books, documents, papers or effects, to which, but for the amalgamation, the dissolved company would have been entitled, are required by the Railways' Clauses Act 1863 to deliver the same to the amalgamated company, or to such persons as it may appoint to receive them.¹ And the same statute provides that all registers of shares, stock, mortgages, and all other documents of the dissolved company, and all registers and books of transfers thereof respectively, and all shareholders' and stockholders' address books, and all certificates of shares or stock of the dissolved company, which are valid and subsisting at the time of amalgamation, shall continue to be valid and subsisting and shall have the same operation and effect as before the dissolution, unless and until new or altered registers, books, and certificates respectively are substituted in their stead;² and that all transfers, sales, or dispositions of stock or shares made before the dissolution and not then completed, shall have the same operation and effect as if made after the dissolution.³

¹ 3 & 27 Vict. ch. 92, § 48.

² 3 & 27 Vict. ch. 92, § 53.

³ 3 & 27 Vict. ch. 92, § 53.

553. (h). Upon the rights, privileges and immunities of the original companies.—It is well settled by numerous decisions that when two or more railroad companies form by union or consolidation a new or consolidated company, the latter, as restricted by the laws under which the consolidation takes place, succeeds to and possesses the franchises, rights, privileges and immunities of the original companies from which it is formed.¹ In



New York it is expressly enacted that upon the consummation of the act of consolidation, all and singular the rights, privileges, exemptions and franchises of each of the corporations, and all the property, real, personal and mixed, and all the debts due on whatever account to either of the corporations, as well as all stock subscriptions and other things in action belonging to either of the corporations, shall be taken and deemed to be transferred to and vested in the new corporation, without further act or deed; and all claims, demands, property, rights of way and every other interest, shall be as effectually the property of the new corporation as they were of the former corporations parties to the agreement and act; and the title to all real estate, taken by deed or otherwise, under the laws of that State, vested in either of the corporations, parties to the agreement and act, shall not be deemed to revert or be in any way impaired by reason of the act or any thing done by virtue thereof, but shall be vested in the new corporation by virtue of the act of consolidation.² And in England a similar statute provides that in every case of amalgamation, the undertaking, railways, harbors, navigations, ferries, wharves, canals, works, real and personal property, powers, authorities, privileges, exemptions, rights of action and suits, and all the other rights and interests of the dissolved company, shall, subject to the contracts, obligations, debts and liabilities of that company, become at the time of amalgamation, and by virtue of the amalgamating act, vested in the amalgamated company, and may and shall be held, used, exercised and enjoyed by the amalgamated company in the same

ner and to the same extent as the same respectively at the time of amalgamation are, or, if the amalgamating act were not passed, might be held, exercised and enjoyed by the dissolved company.² The same act makes all special statutes relating to or affecting the dissolved company applicable to the amalgamated company unless repealed by the special act authorizing the amalgamation.⁴ And in England the same tolls are to be calculated and assessed at such rates as if the amalgamated railways had originally formed one line.⁵ In a well-considered case in Maine, it was decided that when a new corporation is formed out of two or more previously existing corporations, and by the act creating the new company it is to enjoy "all powers, privileges and immunities possessed by any of the corporations" from whose union it was constituted, the consolidated company will have only the privileges, powers and immunities only which *all* had, "and it will not have those special powers, privileges and immunities which some had and some did not have."⁶

Zimmer v. State, 30 Ark. 577, citing *Baltimore v. Baltimore etc. Co.* 6 Gill, 283, 285, 48 Am. Dec. 531; *Tamlinson v. Branch*, 15 Wall. 460, 1853; *Tennessee v. Whitworth*, 117 U. S. 129; *Green County v. Conness*, 109 Ind. 104; *Indianapolis etc. R. R. Co. v. Jones*, 29 Ind. 435; 93 Am. Dec. 111; *Miller v. Lancaster*, 5 Cal. 514; *Paine v. Lake Erie etc. R. R. Co.* 31 Ill. 63; *Cooper v. Corbin*, 105 Ill. 234.

N. Y. Laws of 1869, ch. 817, § 4.

26 & 27 Vict. ch. 92, § 38.

26 & 27 Vict. ch. 92, § 38.

8 Vict. ch. 20, § 91.

State v. Maine Central R. R. Co. 68 Me. 482, 514.

554. The same subject, continued and illustrated.—The consolidated company acquires the right of eminent domain conferred by the State



upon the original companies,¹ and it may continue condemnation proceedings for the acquisition of right of way begun by the original corporations.² Appropriations to one of the original companies are payable to the new.³ The new company may mortgage the entire property acquired by consolidation,⁴ and its mortgage debts are superior to the unsecured debts of the old companies.⁵ The consolidated company may avail itself of a license to use a patent right granted one of the constituent companies.⁶ And an exemption from jury duty enjoyed by the officers of the old companies, vests in those of the new.⁷ But natural persons purchasing the rights, privileges and franchises of a corporation under a foreclosure sale do not thereby acquire the right to be a corporation.⁸

1 *South Carolina R. R. Co. v. Blake*, 9 Rich. 228, 233.

2 *Kip v. New York etc. R. R. Co.* 67 N. Y. 227; *Toledo etc. R'y Co. v. Dunlap*, 47 Mich. 456.

3 *Scott v. Hansheer*, 94 Ind. 1.

4 *Mead v. New York etc. R. R. Co.* 45 Conn. 199.

5 *Tyson v. Wabash R'y Co.* 15 Fed. Rep. 763.

6 *Ridgway Township v. Griswold*, 1 McCrary, 151; *Lightner v. Boston etc. R. R. Co.* 1 Low. 338.

7 *Zimmer v. State*, 30 Ark. 677. See, also, *Fisher v. New York etc. R. R. Co.* 46 N. Y. 644.

8 *Chaffee v. Ludeling*, 27 La. An. 607. Cf. *Benson v. Lang*, 85 Pa. St. 129.

§ 555. (i). **Upon exemption from taxation.**—If the rights and privileges of the constituent companies be not conferred upon the consolidated corporation by the enabling act, an exemption from taxation does not descend to the new corporation.¹ Where, however, the act of consolidation grants to the new company the rights and privileges of the original corporations, it is held to confer upon the former an exemption from taxation enjoyed by the

r;³ but only to the extent of the property of of the original companies as enjoyed that unity.² And even though the consolidating may provide that the new company shall have the privileges and immunities of the original panies, yet if their exemption from taxation qualified by their duties and dependent upon n, and they incapacitated themselves from the orformance of those duties by their consolidation, new company thus formed cannot claim the ofit of the exemption.⁴

St. Louis etc. R'y Co. v. Berry, 113 U. S. 405; *Louisville etc. R. R. v. Salmon*, 108 U. S. 244. Cf. *Memphis etc. R. R. Co. v. Railroad Commissioners*, 113 U. S. 608.

Tennessee v. Whitworth, 117 U. S. 122, 145, and cases cited in opinion of Justice WAITE.

Chesapeake etc. R. R. Co. v. Virginia, 34 U. S. 719; *Delaware Rail-Tax*, 18 Wall. 308; *Tomlinson v. Branch*, 15 Wall. 460; *Philadelphia Ry Co. v. Maryland*, 10 How. 376; *Baltimore v. Baltimore etc. R. R. Co.*, 111 U. S. 256; 48 Am. Dec. 631. See, also, *Central R. R. Co. v. Georgia*, 18 U. S. 661. Cf. *Railroad Co. v. Maine*, 36 U. S. 403.

Railroad Co. v. Maine, 36 U. S. 403, affirming 5 C. 243 (nom. State also *Central R. R. Co. 66 Me. 495*). See further upon this general tion, *Tennessee v. Whitworth*, 117 U. S. 122; *Chesapeake Ry Co. v. Virginia*, 34 U. S. 719, 185; *Louisville etc. R. R. Co. v. Kentucky*, 113 U. S. 253; *Railroad Co. v. Commissioners*, 103 U. S. 144; *Journal Co. v. New York*, 97 U. S. 697, 711; *Chesapeake etc. R. R. Co. v. Virginia*, 34 U. S. 719; *Phil R. R. etc. Co. v. Georgia*, 92 U. S. 475; *Sutton v. R. R. Co. v. Virginia*, 92 U. S. 676, n.; *Philadelphia etc. R. R. Co. v. Maryland*, 10 How. 376; *Minot v. Philadelphia etc. R. R. Co.*, 18 Wall. 300.

556. (j.) Upon the obligations of the original companies to the public and to individuals.—When a new corporation is formed by the amalgamation of two or more distinct corporations into one, inasmuch as the new corporation succeeds to all the faculties and rights of the several components, it must, as a necessary consequence, be subject to all the conditions and duties also, imposed by the law of their creation, both to the public and to private persons,¹ except such obligations as are, in their nature, personal to the

original companies;² or except so far as it may be otherwise provided by the act under which the consolidation is effected.³ For corporations cannot by their own acts, divest themselves of the duties and liabilities imposed upon them by law, the performance of which was the consideration upon which the charters were granted, and which thus entered into their contract with the commonwealth.⁴ In England, the law upon this point has been reduced to the form of a statute the Railways' Clauses Act of 1863, which declares that, notwithstanding the dissolution of the dissolved company, and the amalgamation, everything before the time of amalgamation done, suffered, and confirmed respectively, under or by virtue of any special act relating to the dissolved company, shall be as valid as if the amalgamating act had not been passed; and the dissolution and amalgamation, and the amalgamating act, and this part of this act, respectively, shall accordingly be subject, and without prejudice, to everything so done, suffered, and confirmed, respectively, and to all rights, liabilities, claims and demands, present or future, which, if the dissolution and amalgamation had not taken place, and the amalgamating act had not been passed, would be incident to or consequent on anything so done, suffered and confirmed, respectively; and with respect to all things so done, suffered and confirmed respectively, and to all such rights, liabilities, claims and demands, the amalgamated company shall, to all intent, represent the dissolved company; and the generality of this present provision shall not be deemed to be restricted by any other of the pro-

of this part of this act, or by any provision amalgamating act that does not expressly or this present provision, and expressly rehe operation thereof.⁶

Lincoln v. Branch, 15 Wall. 460; *Gould v. Langdon*, 43 Pa. 84. new company may compromise or settle any claims against the corporations: *Pease v. Lake Erie etc. R. R. Co.* 31 Ind. 2-3.

St. Louis v. St. Louis etc. R. R. Co. 62 Mo. 43. See *Montgomery etc. v. Baring*, 51 Ga. 582. *Vide* *infra*, § 557.

Chicago etc. R. R. Co. v. Moffitt, 75 Ill. 524, 528. *Acc.* *Tennessee etc. R. R. Co. v. Peoria etc. R'y Co. v. Coal Valley Mining Co.*

East v. Newburyport Horse R. R. 127 Mass. 304; *McCluer v. etc. R. R.* 13 Gray, 124; 74 Am. Dec. 624; *Langley v. Boston etc. R. R. Co.* 10 Gray, 103; *Freeman v. Minneapolis etc. R'y Co.* 28 Minn. 100; *Ditchett v. Spuyten Duyvil etc. R. R. Co.* 67 N. Y. 425. *Q.* *anuf. etc. Co. v. Ullman*, 89 Ill. 244.

§ 27 Vict. ch. 92, § 65.

6.

57. The same subject, continued—Continuing obligations and personal obligations.—The consolidated company assumes all the *continuing* obligations of the corporations merged into it, that obligations which are not purely personal to constituent companies, and which in their nature can be performed by them only.¹ Thus, the obligation of one of the original companies to create a stream, the usefulness of which had been derived by its works, devolves upon the consolidated company.² So, a contract of one of the old companies to haul the coaches of a sleeping-car company, must be performed by the new corporation over that portion of its line formerly owned by the old.³ In a recent case, however, it was held that a provision in a contract of purchase of property and franchises of one company by another, that all existing contracts for certain rates "shall be respected and maintained at rates not exceeding the present rates," was held

not to be perpetual as to those contracts merely as binding the purchaser to respect during what remained of their unexpired term. And again the purchasing or consolidated company becomes subject to restrictions upon charges for transportation, as to that part of its traffic which is conducted over the purchased road.⁵ This is provided by a statute in New York, which declares that nothing in this act contained shall be so construed as to allow the consolidated company to charge a higher rate of fare per passenger per mile upon any part or portion of the consolidated line, than is now allowed by law to be charged by each existing company respectively.⁶

1 *Daniels v. St. Louis etc. R. R. Co.* 62 Mo. 43; *Montgomery etc. R. Co. v. Baring*, 51 Ga. 582.

2 *Chicago etc. R. R. Co. v. Moffitt*, 75 Ill. 524.

3 But only over that part of its line: *Pullman Palace Car Co. v. Missouri Pacific R'y Co.* 115 U. S. 587, 595.

4 *Hurt v. Ferrill* (Va. 1887.)

5 *Campbell v. Marietta etc. R. R. Co.* 23 Ohio St. 168. Cf. *Daniels v. St. Louis etc. R. R. Co.* 62 Mo. 43.

6 N. Y. Laws of 1869, ch. 917, § 7; N. Y. Laws of 1875, ch. 108, § 1, amended by N. Y. Laws of 1883, ch. 387.

§ 558. Provisions of the English statute concerning the completion of works begun by the dissolved company.—With respect to all works which the dissolved company is at the time of amalgamation authorized or bound to execute and complete, and which are not then executed or completed, it is provided by the English Railways Clauses Act of 1863, that they may, or shall (as the case may require), be executed or completed by the amalgamated company, and for that purpose the amalgamated company shall have and be subject to all the powers, rights and conditions which

conferred or imposed upon the dissolved company, and which but for the passing of the amalgamating act, might have been exercised by or against the dissolved company.¹

26 & 27 Vict. ch. 92, § 45.

559. (k). Upon liability for torts.—No liability imposed upon the companies entering into a consolidation for the torts of the new organization. For all purposes except the settlement of their affairs they are considered dissolved.¹ On the other hand, the consolidated company becomes liable for torts committed by the original companies before the consolidation, and actions to recover damages for injuries to persons or property done by the latter, may be maintained against the new one.² But while this is the rule in cases of consolidation properly so called, the principle does not apply to cases where the union between two companies has been effected by lease.³ The consolidated company cannot plead in an action against it for a tort that the consolidation was not authorized by law.⁴

And a judgment against one of the original companies for a tort committed by the consolidated company being void, no execution can issue on even against the consolidated company: *Gray v. National Steamship Co.* 115 U. S. 116, 121.

St. Louis etc. R. R. Co. v. Marker, 41 Ark. 542; *Warren v. Mobile* 1 R. R. Co. 49 Ala. 552; *Coggia v. Central R. R. Co.* 62 Ga. 685; 35 Am. 122; *Texas etc. R. R. Co. v. Murphy*, 40 Texas, 385; 23 Am. Rep. 272; *Jenson v. Texas etc. R. R. Co.* 42 Texas, 163; *New Bedford R. R. Co. v. Colony R. R. Co.* 120 Mass. 397; *Railroad Co. v. Hutchins*, 37 Ohio 52; *Chicago etc. R. R. Co. v. Moffitt*, 75 Ill. 524. See *Columbus etc. Co. v. Skidmore*, 63 Ill. 166; *Indianola R. R. Co. v. Fryer*, 54 Texas, 126; *Houston etc. R. R. Co. v. Shirley*, 54 Texas, 126.

Vide infra, § 563.

Bissell v. Michigan Southern etc. R. R. Co. 23 N. Y. 258, 263; *Reynolds v. Myers*, 11 Vt. 44; *Ollender v. Painesville etc. R. R. Co.* 10 St. 516; *Racine etc. R. R. Co. v. Farmers Loan and Trust Co.* 49 Ill. 347; 25 Am. Dec. 635. Cf. *Carey v. Cincinnati etc. R. R.* 5 Iowa, 337.

abling act or the contract of consolidation, w company is not liable upon the debts of iginal corporations except so far as the prop- erved from each may suffice to satisfy their tive creditors.¹ It is held that, where two ds are consolidated, as far as one of the cred- of one of the original companies is concerned, nsolidated compa:y is the successor of the mpany; but, in respect to the properties of ther companies, it is a new and independent any, and such a creditor has no claim against n the original contract, but only by virtue of sumption of the obligations of the old compa-

The consolidated company may be expressly red, however, to assume personally all the of each of its constituent parts, without re- to the sufficiency of the property derived from to satisfy the claims.³ Thus, in New York, enacted that the rights of all creditors of and ens upon the property of either of the corpora- parties to the agreement and act shall be pre- ed unimpaired, and the respective corporations be deemed to continue in existence to pre- e the same, and all debts and liabilities in- ed by either of the corporations, except mort- s, shall thenceforth attach to the new corpora- , and be enforced against it and its property the same extent as if those debts and liabilities been incurred or contracted by it."⁴ But a ute providing that, in case of the consolidation two or more companies, the new corporation ll be liable for all the debts of each company ering into the arrangement, applies only to panies which may thereafter consolidate.⁵ And

the foregoing principles with respect to the liability of the consolidated company are restricted to consolidations voluntarily entered into by the several companies.⁶

1 *Prouty v. Lake Shore etc. R. R. Co.* 52 N. Y. 363; *Shackleford v. Mississippi Central R. R. Co.* 52 Miss. 159. Cf. *Indianola R. R. Co. v. Tex.* 58 Tex. 609; *Houston etc. R. R. Co. v. Shirley*, 54 Tex. 125.

2 *Boardman v. Lake Shore etc. R'y Co.* 84 N. Y. 157, 181; *Chas. Vand'rbilt*, 62 N. Y. 307; *Prouty v. Lake Shore etc. R'y Co.* 52 N. Y. 363; *Houston etc. R. R. Co. v. Shirley*, 54 Tex. 125. Cf. *Sage v. Lake Shore etc. R'y Co.* 70 N. Y. 220.

3 *Warren v. Mobile etc. R. R. Co.* 49 Ala. 582; *Western Union R. R. Co. v. Smith*, 75 Ill. 496.

4 N. Y. Laws of 1869, ch. 917, § 5.

5 *Wood's Railway Law*, 1682; *Hatcher v. Toledo etc. R. R. Co.* 2 Ill. 477.

6 *Houston etc. R. R. Co. v. Shirley*, 54 Tex. 125.

§ 562. **The consolidated company not a purchaser without notice.**—The consolidated company does not stand in the shoes of a purchaser without notice with respect to the property derived from the original companies.¹ All subsisting liens on that property remain unimpaired,² and although dormant and unrecorded, the consolidated company cannot plead ignorance of them.³ Nor can it plead ignorance of a contract made by one of the original companies to sell its property.⁴ The equitable liens of creditors of the old companies are superior to the liens of the same class of creditors of the new;⁵ but the claims of unsecured creditors of the constituent corporations are inferior to a mortgage upon the whole of the consolidated property.⁶

1 *The Key City*, 14 Wall. 653; *North Carolina R. R. Co. v. Drew*, 3 Woods, 691; *Mississippi Valley B. R. Co. v. Chicago etc. R. R. Co.* 53 Miss. 896; 38 Am. Rep. 348. Cf. *Whipple v. Union Pacific R'y Co.* 28 Kans. 474.

2 *Rutten v. Union Pacific R'y Co.* 17 Fed. Rep. 480; *The Key City*, 14 Wall. 653; *North Carolina R. R. Co. v. Drew*, 3 Woods, 691; *Mississippi Valley B. R. Co. v. Chicago etc. R. R. Co.* 53 Miss. 896; 38 Am. Rep. 348.

3 *The Key City*, 14 Wall. 653; *Mississippi Valley B. R. Co. v. Chicago*

R. Co. 58 Miss. 896; 38 Am. Rep. 348. See *McAlpine v. Union Ry Co.* 23 Fed. Rep. 162.

McAlpine v. Union Pacific Ry Co. 23 Fed. Rep. 163.

Schlesford v. Mississippi Central R. R. Co. 52 Miss. 183.

Men v. Wabash R. R. Co. 15 Fed. Rep. 763.

63. The remedies of creditors of the original companies.—Actions against a company, which consolidated with another, may be brought against it under the consolidated name, and it will not be allowed to escape from denying its identity.¹ When the terms of consolidation provide that the constituent companies shall continue in existence for the purpose of adjusting all claims against them, an unliquidated claim against one of the old companies may be adjudicated in an action against the latter, and it can be enforced against the new corporation.² Where, however, the consolidating statute provides that the president of the new company shall be held in law, as to service of process, as president of "each of the constituent companies," an unliquidated claim, as, for example, for personal injuries, may be made the basis of an action against the consolidated company in the first instance.³ And it has been held, that after a railway company has consolidated with another as authorized by their charters, and confirmed by legislation conferring all rights, powers, and privileges upon the new corporation, liability of either of the old companies can be enforced against the new corporation.⁴ Judgment against the consolidated company, on claims against one of the original corporations, may be enforced by execution upon the property of the latter notwithstanding its dissolution.⁵ Where, however,

there is a concourse of creditors of the original companies, it is held in Virginia that they shall not be required to levy execution, each against those portions only of the property originally belonging to the companies respectively indebted to them; but that they may sell the whole consolidated property and apportion the proceeds among themselves; the court in this case saying, "if cut up into parcels and sold by divisions it would lose its great value as a continuous line of road."⁶ For, it was reasoned, the fact that the particular separate division on which the mortgage rests is sold at the same time and together with other divisions of the road, is in no manner a violation of the contract of the mortgagee.⁷ With respect to evidence in actions against the amalgamated company, it is enacted in England that all books and documents which would have been evidence in respect of any matter for or against the dissolved company, shall be admitted as evidence in respect of the same, or the like matter, for or against the amalgamated company.⁸

1 Columbus etc. R. R. Co. v. Skidmore, 69 Ill. 566.

2 Whipple v. Union Pacific R. R. Co. 28 Kan. 474 (an action for personal injuries).

3 Warren v. Mobile etc. R. R. Co. 49 Ala. 582.

4 Taylor on Corporations, 665; Indianola R. R. Co. v. Fryer, 56 Tex. 609. Cf. Houston etc. R. R. Co. v. Shirley, 54 Tex. 125; People v. Erie etc. Ins. Co. 93 N. Y. 105.

5 Ketcham v. Madison etc. R. R. Co. 20 Ind. 26.

6 Gilbert v. Washington City etc. R. R. Co. 33 Gratt. 585, 611.

7 Gilbert v. Washington City etc. R. R. Co. 33 Gratt. 586, 611.

8 26 & 27 Vict. ch. 92, § 50.

§ 564. (m.) Upon the jurisdiction of the several States.—A corporation cannot be created by the co-operating legislation of two States so as to be the same legal entity in both States; and where

States have each created a corporation with the same name, for the same purposes, and composed of the same natural persons, it must, nevertheless, be considered as a distinct corporation in each State.¹ A corporation may have a two-fold organization, and be, so far as its relation to one State is concerned, both foreign and domestic. It may have a corporate entity in each State, yet, in general character, be of a bifold organization.² Accordingly, none of the States can impair the rights vested in the companies composing the consolidated corporation. No one of the States can, for example, impose a tax on the whole property of the consolidated company, when one of them was originally exempt from taxation, unless the denial of the exemption was a condition of obtaining the consolidation;³ and generally, in all other respects, the component parts of a consolidated company continue subject to the laws and jurisdiction of the respective States wherein they were formed and from which they originally received their charters.⁴ Thus, each of the original companies continues subject to the insolvency laws of the State of its creation,⁵ and to statutes regulating rates for transportation,⁶ and to the jurisdiction of the courts of the State with respect to the appointment of receivers.⁷ When, however, the two corporations have the same name, the same stockholders, a unity of stock and of interest, an act on the part of one of them will bring all the parties necessary for the complete settlement of a controversy, before the court, and its decrees will be binding upon them.⁸ But a State is not to be deprived of its jurisdiction over a corporation created

by it, in actions brought by its citizens against under its new name, by a removal of the cause the federal court upon the motion of one of the consolidating companies created by another State

1 *Racine etc. R. R. Co. v. Farmer's Loan and Trust Co.* 49 Ill. 331; 55 Am. Dec. 535. *Acc.* *Burger v. Grand Rapids etc. R. R. Co.* 22 Fed. Rep. 561; *Colglazier v. Louisville etc. R'y Co.* 22 Fed. Rep. 568.

2 *Burger v. Grand Rapids etc. R. R. Co.* 22 Fed. Rep. 561; *Colglazier v. Louisville etc. R. R. Co.* 22 Fed. Rep. 568; *Ohio etc. R. R. Co. v. White* 1 Black. 26; *State v. Northern Central R'y Co.* 17 Md. 193; *Sprague v. Hartford etc. R. R. Co.* 5 R. I. 233; *McGregor v. Erie R'y Co.* 35 U. S. 115; *State v. Metz*, 33 N. J. 193.

3 *Chesapeake etc. R. R. Co. v. Virginia*, 94 U. S. 718; *Branch v. Charleston*, 92 U. S. 677; *Philadelphia etc. R. R. Co. v. Maryland*, 10 H. 533; *Delaware R. R. Co. v. Cox*, 18 Wall. 206; *State v. Commissioner of Railroad Taxation*, 37 N. J. 243; *Wood's Railway Law*, 1685.

4 *Graham v. Boston etc. R. R. Co.* 118 U. S. 161; *S. C.* 14 Fed. Rep. 773; *Stone v. Farmers' Loan & Trust Co.* 116 U. S. 307; *Stone v. Illinois Central R. R. Co.* 113 U. S. 317; *Farnum v. Blackstone Canal Co.* 1 Sum. 120; *Eaton et. R. R. Co. v. Hunt*, 20 Ind. 457; *Chicago etc. R. R. Co. v. N. E. R. R. Co.* 75 Ill. 524; *Racine etc. R. R. Co. v. Farmer's Loan & Trust Co.* 49 Ill. 331; 95 Am. Dec. 535.

5 *Platt v. New York etc. R. R. Co.* 26 Conn. 544, 571.

6 *Stone v. Farmers' Loan & Trust Co.* 116 U. S. 307.

7 *In re United States Rolling Stock Co.* 55 How. Pr. 286; *Taylor v. Atlantic etc. R. R. Co.* 55 How. Pr. 286; *Ellis v. Boston etc. R. R. Co.* 15 Mass. 1; *Richardson v. Vermont etc. R. R. Co.* 44 Vt. 613.

8 *Paine v. Lake Erie etc. R. R. Co.* 31 Ind. 347.

9 *Chicago etc. R. R. Co. v. Lake Shore etc. R'y Co.* 5 Fed. Rep. 12.

§ 565. **Of lease.**—Charter or statutory authority to consolidate does not confer power to lease.¹ Conditions in statutes authorizing railway companies to lease their roads must be fully complied with, otherwise the lease will be invalid.² Thus, when an act authorizes a lease of the company's property to another company upon the certificate of the board of trade being obtained, no lease can be valid before the certificate has been obtained, and mere references in subsequent acts of Parliament to an agreement for a lease which has been entered into will not make the agreement valid.³ A lease

⁴ railway property should contain all usual and

proper covenants on the part of the lessee for maintaining the railway, or the portion thereof comprised in the lease, in good and efficient repair and working condition during the continuance thereof, and for so leaving it at the expiration of the term thereby granted, and such other provisions, conditions, covenants, and agreements as are usually inserted in leases of like nature.¹ Where the power to make a lease is vested in the shareholders of the company, the directors cannot radically modify its terms and conditions.² Dissenting shareholders may restrain an unauthorized lease.³

1 *Mills v. Central R. R. Co.* 41 N. J. Eq. 1, 7. See *Archer v. Terre Haute etc. R. R. Co.* 102 Ill. 493; S. C. 7 Am. & Eng. R. R. Cas. 249.

2 *Peters v. Lincoln etc. R. R. Co.* 14 Fed. Rep. 319; *Kent Coast R'y Co. v. London etc. R'y Co.* Law R. 3 Ch. App. Cas. 656; *Wood's Railway Law*, 1686.

3 *Kent Coast R'y Co. v. London etc. R'y Co.* Law R. 3 Ch. App. Cas. 656; *Browne & Theobald's Railway Law*, 317.

4 8 Vict. ch. 20, § 112.

5 *Metropolitan Elevated R'y Co. v. Manhattan Elevated R'y Co.* (N. Y. 1884) 14 Abb. N. Cas. 103 235; S. C. 15 Am. & Eng. R. R. Cas. 1, 51. See, also, *Harkness v. Manhattan Elevated R'y Co.* N. Y. Daily Reg. Oct. 8, 1886. *Of. People v. Metropolitan Elevated R'y Co.* 26 Hun, 84.

6 *Pond v. Vermont etc. R. R. Co.* 12 Blatchf. 280; *Tippecanoe County v. Lafayette etc. R. R. Co.* 50 Ind. 85.

§ 566. **Statutory authority requisite to validity of lease.**—Although a railway company may lease its property and road, where not prohibited by statute or some principle of public policy,¹ it may not lease its *franchises* without special legislative authority.² In a recent well-considered case it was said, that unless expressly authorized by its charter or by legislative enactment, a railway company cannot, by lease or by other contract, turn over to another company for a long period of time its road and the appurtenances thereto, the use of its franchises and the exercise of its powers; nor

can any other railroad company, without similar authority, make a contract to receive the road, franchises and property of another railway.³ A lease or sale of franchises unauthorized by charter or statute, is not only an *ultra vires* act with respect to dissenting shareholders of the company, but it is also such an excess of its corporate powers as renders the company liable to forfeiture of charter at the instance of the State.⁵

1 *Pittsburg etc. R. R. Co. v. Columbus etc. R. R. Co.* 8 Biss. 456.

2 *Thomas v. The Railroad Co.* 101 U. S. 71; *Abbott v. Johnstown, etc. R. R. Co.* 80 N. Y. 27; 36 Am. Rep. 572; *Troy etc. R. R. Co. v. Boston etc. R. R. Co.* 86 N. Y. 107; *Woodruff v. Erie R. R. Co.* 25 Hun. 246; *Pittsburg etc. R. R. Co. v. Bedford etc. R. R. Co.* 81 Pa. St. Suppl. 104; *Archer v. Terre Haute etc. R. R. Co.* 102 Ill. 493; *Hinkley v. Gildersleeve*, 19 Grant (U. C.), 312; *Attorney-General v. Niagara Falls etc. Co.* 20 Grant, (U. C.) 34.

3 *State v. Atchison etc. R. R. Co.* 24 Neb. 143, 4 R'y & Corp. Law J. 86, 91, citing *Railroad Co. v. Railroad Co.* 118 U. S. 294; and *Thomas v. The Railroad*, 101 U. S. 71. Acc. *East Anglian R'y Co. v. Eastern Counties R'y Co.* 11 Com. B. 775; S. O. 21 Law J. Com. P. 23; *Great Northern R'y Co. v. Eastern Counties R'y Co.* 9 Hare, 306; *Beman v. Rufford*, 1 Sim. N. S. 550. See further, upon the power of a corporation to acquire by lease or sale the franchises of another company: *Pennsylvania Co. v. St. Louis R. R. Co.* 118 U. S. 290; *Gere v. New York Central R. R. Co.* 19 Abb. N. Cas. 193; *Mills v. Central R. R. Co.* 41 N. J. 1; S. O. 25 Am. Law Reg. 610; *Woodruff v. Dubuque etc. R. R. Co.* (U. S. Cir. Ct. 1887) 19 Abb. N. Cas. 437, and note. In England it is enacted that no railway company shall grant or accept a lease or transfer of any railway unless under a distinct provision of an act specifying the parties: 8 & 9 Vict. ch. 96.

6 *Pennsylvania R. R. Co. v. St. Louis etc. R'y Co.* 118 U. S. 290; *Thomas v. The Railroad Co.* 101 U. S. 71; *Troy etc. R. R. Co. v. Boston etc. R'y Co.* 86 N. Y. 107; *Abbott v. Johnstown etc. R. R. Co.* 80 N. Y. 27; 36 Am. Rep. 572; *People v. Albany etc. R. R. Co.* 77 N. Y. 232.

§ 567. Lessees of railways authorized to acquire the stock and absorb their lessors—The New York statute.—In New York, any railway company or its successor, created under the laws of that State, and being the lessor of the road of any other railway company, is authorized by statute to take a surrender or transfer of the capital stock of the shareholders, or any of them, in the corporation whose road is held under lease,

and to issue in exchange therefor the like additional amount of its own capital stock at par, or on such other terms and conditions as may be agreed upon between the two corporations; and whenever the greater part of the capital stock of any such corporation shall have been so surrendered or transferred, the directors of the company taking the surrender may, by a resolution entered upon their minutes, elect to become directors of the leased road; and thereafter they are declared by the statute to be *ex officio* the directors of the corporation whose road is so held under lease; and they are empowered to manage and conduct the affairs thereof, as provided by law. It is further enacted that whenever the whole of the capital stock shall have been so surrendered or transferred, and a certificate thereof filed in the office of the Secretary of State, under the common seal of the corporation to which the surrender shall have been made, the franchises, privileges and property of the other company shall thereupon vest in the latter and be controlled by its board of directors and under its corporate name. But it is expressly declared that the rights of any stockholder not surrendering or transferring his stock shall not be in any way affected by these provisions; and that existing liabilities, or the rights of creditors of the corporation, when stock shall have been so surrendered or transferred, shall not be in any way affected or impaired by the act.¹

1 N. Y. Laws of 1867, ch. 254, § 1, as amended by N. Y. Laws of 1879, ch. 503. See also N. Y. Laws of 1855, ch. 302.

§ 568. Of the effect of lease.—A lease of railway property generally entitles the lessee to the

free use of the railway comprised therein, and to the enjoyment of the powers and privileges granted to the lessor, and at the same time subjects the lessee to the corresponding duties and obligations of its lessor except such as are purely personal in their nature.¹ Thus, a lease of a line of railway has been held to entitle the company becoming lessee to the benefit of an agreement entered into by the lessor for the use of a part of a third company's line.² So, under an agreement by one company to work and maintain the line of another company, the working company is entitled to exclusive possession.³ When a railroad company leases the road of another, its charges for transportation thereon are subject only to the restrictions imposed upon itself with respect to transportation upon its own line.⁴ A company leasing a railway in another State, is subject to the legislation of that State so far as it affects the property leased.⁵

1 *Chicago v. Evans*, 24 Ill. 52; *London etc. R'y Co. v. South Eastern R'y Co.* 8 Ex. 584; 8 Vict. ch. 20, § 113.

2 *London etc. R'y Co. v. South Eastern R'y Co.* 8 Ex. 584.

3 *Sevenoaks etc. R'y Co. v. London etc. R'y Co.* 11 Ch. Div. 625; 27 Week. R. 672. As to the effect of covenants in a lease by one company efficiently to work and repair the railway and works, see *West London R'y Co. v. London etc. R'y Co.* 22 Law J. Com. P. 117; 11 Com. B. 327; *East London R'y Co. v. London etc. R'y Co.* 2 Nev. & M. 413. As to the construction of a lease providing that the lessee should place to the account of the lessors a due mileage proportion of the gross receipts derived from through traffic, see *Salisbury etc. R'y Co. v. London etc. R'y Co.* 3 Nev. & M. 314; *Browne & Theobald's Railway Law*, 317.

4 *Rodgers v. Wheeler*, 43 N. Y. 598; *Pearson v. Wheeler*, 55 N. Y. 41; *Taylor on Corporations*, § 417. Cf. *Stratton v. European etc. R'y*, 74 Me. 422; *Beeson v. Lang*, 85 Pa. St. 197.

5 *Stone v. Illinois Central R. R. Co.* 116 U. S. 347.

§ 569. **Of the effect of lease upon liability for torts.**—A railway company cannot, without legislative authority, by a lease of its road exonerate itself from liability to persons sustaining injuries

through its negligence.¹ The lessee company is not liable for the torts of the lessor committed prior to its taking possession of the property, nor indeed for such injuries to property and person occurring after possession as are occasioned by the fault of the lessor,² such, for example, as occur through a defect in the original construction of the road.³ But the lessee is liable for any injuries after it enters into possession, arising from its failure to keep the property in repair, as, for example, from its own failure to keep the tracks in good condition,⁴ or from its neglect to build and maintain cattle-guards.⁵ In New York the lessees of railroad corporations are required by statute to maintain fences and cattle-guards at appropriate places.⁶ And the lessee is liable for injuries inflicted through the negligence of its employees in the management of trains,⁷ unless it be operating the road under the name of the lessor.⁸ Where the arrangement between the companies amounts merely to a license permitting one of them to use the property of the other, the licensor is liable for the torts of the licensee.⁹ Thus, a railroad corporation that has granted the use of its road to another company, will be liable for accidents to passengers carried by itself, caused by the negligent management of the trains of the other company.¹⁰ In a case decided recently in Georgia, it was held that the lessor of running privileges would be liable in damages for injuries sustained in an accident occurring to one of its lessee's trains occasioned by the unsafe condition of its tracks, but that for injuries caused by defective trucks of the lessee's cars, the latter only would be liable;

and that if defects both in the trucks and the track occasioned the injury, both lessor and lessee would be liable proportionally.¹¹ If the circumstances are such as to render the lessee liable for torts, it cannot plead by way of defense that the lease was *ultra vires* of the lessor company.¹²

1 *International etc. R. R. Co. v. Eckford*, 71 Texas, 274; 4 Ky. Corp. Law J. 112; following *Railroad Co. v. Morris*, 68 Tex. 58.

2 *Pittsburg etc. R. R. Co. v. Kain*, 35 Ind. 291.

3 *Cook v. Milwaukee etc. R. R. Co.* 36 Wis. 45; *St. Louis etc. R. R. Co. v. Curl*, 28 Kan. 622.

4 *Hoff v. Minneapolis etc. R. R. Co.* 14 Fed. Rep. 558; *Wasson v. Delaware etc. R. R. Co.* 85 N. Y. 312; *Maoney v. Atlantic etc. R. R. Co.* 63 Me. 68; *Philadelphia etc. R. R. Co. v. Anderson*, 94 Penn. St. 313; 39 Am. Rep. 787.

5 *Daconing v. Chicago etc. R. R. Co.* 43 Iowa, 96; *Clary v. Iowa etc. R. R. Co.* 37 Iowa, 342; *Stewart v. Chicago etc. R. R. Co.* 27 Iowa, 282.

6 N. Y. Laws of 1864, ch. 582, § 2.

7 *Tracy v. Troy etc. R. R. Co.* 38 N. Y. 433; 98 Am. Dec. 54; *Davis v. Providence etc. R. R. Co.* 121 Mass. 134; *Clement v. Canfield*, 28 Vt. 32; *Hall v. Browne*, 54 N. H. 495; *Peoria etc. R. R. Co. v. Lane*, 83 Ill. 448.

8 *Bower v. B. & S. W. R. Co.* 42 Iowa, 545.

9 *Alexandria etc. R. R. Co. v. Brown*, 17 Wall. 445; *Illinois Central R. R. Co. v. Barron*, 5 Wall. 90; *Abbott v. Johnstown etc. R. R. Co.* 3 N. Y. 27; 35 Am. Rep. 572; *Nelson v. Vermont etc. R. R. Co.* 28 Vt. 71; 6 Am. Dec. 614; *Chicago etc. R. R. Co. v. Whipple*, 22 Ill. 105; *Chicago etc. R. R. Co. v. McCarthy*, 20 Ill. 335; 71 Am. Dec. 285; *Ohio etc. R. R. Co. v. Dunbar*, 20 Ill. 623; 71 Am. Dec. 291.

10 Taylor on Corporations, § 170; *Railroad Co. v. Barron*, 5 Wall. 90; *Abbott v. Johnstown etc. R. R. Co.* 3 N. Y. 27; 35 Am. Rep. 572.

11 *Augusta etc. R. R. Co. v. Killian*, 78 Ga. 749.

12 *McClellan v. Manchester etc. R. R. Co.* 13 Gray, 124; 74 Am. Dec. 51; *Doolan v. Midland R'y Co.* Law R. 2 App. Cas. 792.

§ 570. Of the effect of an unauthorized lease upon liability for torts.—A company making a lease without legal authority subjects itself to liability for the torts of its lessee committed in the operation of the leased road.¹ In a case where consolidation had been attempted by means of an unauthorized lease, it was held that the lessor company was not in a state of quiescence or torpor,

but that instead of managing its road alone, it operated it in conjunction with others; and that, accordingly, it remained liable for injuries caused by those whom it had associated with itself in the operation and management of its property.²

1 *York etc. R. R. Co. v. Winan*, 17 How. 301; *Alexandria etc. R. R. Co. v. Brown*, 17 Wall. 445; *Abbott v. Johnstown etc. R. R. Co.* 80 N. Y. 27; 33 Am. Rep. 572; *Macon etc. R. R. Co. v. Mayes*, 49 Ga. 335; 15 Am. Rep. 678; *Nelson v. Vermont etc. R. R. Co.* 26 Vt. 717; 62 Am. Dec. 614; *Mahoney v. Atlantic etc. R. R. Co.* 63 Me. 68; *Chicago etc. R. R. Co. v. Whipple*, 22 Ill. 105. Cf. *Woodruff v. Erie R'y Co.* 93 N. Y. 609.

2 *Latham v. Boston etc. R'y Co.* 33 Hun, 265, citing *Abbott v. Johnstown etc. Horse R. R. Co.* 80 N. Y. 27; 36 Am. Rep. 572.

§ 571. Of the recovery of rent upon an *ultra vires* lease.—While a lease unauthorized by charter or statute is *ultra vires* and void,¹ and incapable of being rendered valid by an acceptance of rent,² the lessee and its assigns are estopped from pleading the want of statutory authority in an action to recover rent for the use of the road.³ And while the lessee may not, perhaps, be liable for the amount agreed upon in the void contract, it may be required to pay a just compensation for the use of the property.⁴

1 *Thomas v. The Railroad Co.* 101 U. S. 71; *Tippecanoe County v. Lafayette etc. R. R. Co.* 50 Ind. 85.

2 *Ogdensburgh etc. R. R. Co. v. Vermont etc. R. R. Co.* 4 Hun, 268.

3 *Woodruff v. Erie R'y Co.* 93 N. Y. 609.

4 *Farmers' Loan & Trust Co. v. St. Joseph etc. R. R. Co.* 2 Fed. Rep. 117. But see *Union Bridge Co. v. Troy etc. R. R. Co.* 7 Lans. 240, where it was held that in setting aside an *ultra vires* lease, the court will not relieve the parties more than is necessary for the public good, and that hence rent is not recoverable.

§ 572. Of sale.—While consolidation is frequently effected by the sale of the property and franchises of one corporation to another, every case of sale is not necessarily a consolidation, properly so called; it may be a mere succession. A

succession differs from a consolidation in this respect among others, that the purchaser acquiring the property and franchises of a corporation does not thereby become responsible for its liabilities already accrued.¹ A corporation cannot without authority from the State, sell, transfer or assign its corporate *franchise*;² nor can a corporation against the dissent of a single stockholder effect a valid sale of its *property*, unless express authority to sell is conferred by an existing statute, or by the charter of the company, or by an amendment thereof constitutionally made;³ or unless the sale be made with a view to the dissolution of the corporation and the payment of its debts.⁴ But even though the object of sale be a dissolution of the corporation, it cannot be legally effected against the dissent of a minority of shareholders, where the business of the company is in a prosperous condition. The minority have a right to insist upon the prosecution of the business in which they have engaged, so long as it continues to prosper.⁵ When the property of one corporation is sold to another, no shareholder of the former can be required without his own consent to accept the stock of the latter as his share of the proceeds of the sale.⁶ For a transaction of this description would in effect amount to a consolidation of the two companies.⁷ A company may, however, sell its assets for the stock of another company having a fixed money value and capable of being converted into money at any time, and of being distributed as money among shareholders not consenting to the arrangement.⁸ If, as is seldom the case, the property of a corporation be sold for a sum more than sufficient

to discharge its debts, the surplus should be distributed among all the shareholders, whether ordinary or preferred, in proportion to the amounts paid by them respectively, upon their shares. For such a surplus is not deemed to be "profits" within the meaning of the guaranty to preferred shareholders, that they shall receive a certain percentage of the profits of the enterprise before any part thereof be paid to the holders of ordinary stock.⁹

1 Taylor on Corporations, § 415; *Hammond v. Port Royal etc. R. R. Co.* 15 S. C. 10, and 16 S. C. 567; *Cook v. Detroit etc. R'y Co.* 43 Mich. 349; *City of Menasha v. Milwaukee etc. R. R. Co.* 52 Wis. 414; *Gilman v. Sheboygan etc. R. R. Co.* 37 Wis. 317.

2 *Fietsam v. Hay*, 122 Ill. 293; and cases cited *infra*. See, also, cases cited in § 536 *supra*.

3 *Abbott v. American Hard Rubber Co.* 4 Blatchf. 499; S. C. 33 Barb. 578; *Atlantic etc. R. R. Co. Case*. 3 Hughes, 320; *Blatchford v. Ross*, 54 Barb. 42; *International etc. R. R. Co. v. Bremond*, 53 Tex. 96; *Boston etc. R. R. Co. v. New England R. R. Co.* 13 R. I. 260; *Tuttle v. Michigan etc. R. R. Co.* 35 Mich. 247; *Dongan's Case*, 28 Law T. N. S. 60; *Clinch v. Financial Corporation*, Law R. 5 Eq. 450; *Charlton v. Newcastle etc. R'y Co.* 5 Jur. N. S. 1096.

4 *Cook on Stock & Stockh.* § 667; *Smith v. New York etc. Co.* 18 Abb. Pr. 419, 435; *Middlesex R. R. Co. v. Boston etc. R. R. Co.* 115 Mass. 347; *Lauman v. Lebanon Valley R. R. Co.* 30 Pa. St. 42; 72 Am. Dec. 685.

5 *Kean v. Johnson*, 9 N. J. Eq. 401. *Acc.* *Ervin v. Oregon R'y etc. Co.* 23 Blatchf. 517; S. C. 27 Fed. Rep. 635; S. C. 28 Fed. Rep. 833; *Boston etc. R. R. Co. v. New York etc. R. R. Co.* 13 R. I. 260.

6 *Taylor v. Earle*, 8 Hun, 1; *Frothingham v. Barney*, 6 Hun, 366; *McCurdy v. Meyers*, 44 Pa. St. 535; *In re Empire Assoc. Law R.* 4 Eq. 341; *Clinch v. Financial Co. Law R.* 4 Ch. 117; *Bird v. Bird's etc. Co. Law R.* 9 Ch. 358; *Morawetz on Corporations*, 212.

7 *Morawetz on Corporations*, 212. See, however, *St. Louis etc. R. R. Co. v. Fiernan*, 37 Kan. 606.

8 *Treadwell v. Salisbury Manuf. Co.* 73 Mass. 393; 66 Am. Dec. 480; *Morawetz on Corporations*, 212.

9 *In re Bridgewater Navigation Co. (Limited)*, (Ch. Div. 1887), 3 R'y & Corp. Law J. 591.

DISSOLUTION.

CHAPTER XXII.

DISSOLUTION,

AND HEREIN OF FORFEITURE AND APPEAL.

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§ 573. **Introductory.**—The dissolution of a corporation, the termination of its existence and political death, may result from the expiration of the term of years named in the statute, charter, or articles of association from which it derives its being, or it may be accomplished by a resolution of a majority of its shareholders surrendering their charter to the State or entering into an agreement of consolidation with another corporation. Dissolution may be enforced by a bill in equity brought by the creditors, a minority of shareholders, or the directors, when the corporate enterprise is in a failing condition. It may result from a decree of forfeiture in an action instituted by the State against the corporation upon a violation of the compact between itself and the State; or it may result from an act of legislature repealing the corporate charter, when that right has been reserved by the State. There are other circumstances which litigants have plead as in effect working the dissolution of corporations; but while some of them have been admitted by the courts as constituting *grounds* upon which proceedings for dissolution, or even for forfeiture, might be instituted by individuals or by the State, it has been denied that they operate *per se* to dissolve the corporate existence.¹ In the united American States, many questions pertaining

to the dissolution of corporations in the modes indicated above are regulated by statute.¹

¹ *Vide* *infra*, §§ 574-578.

² N. Y. 2 Rev. Stat. 461, 484, §§ 39-41; N. Y. 1 Rev. Stat. 600 (7th ed. 1853); N. Y. Laws of 1849, ch. 226; N. Y. Code Civ. Proc. §§ 1785, 1786, 2413, *etc.*; *In re City Bank*, 53 Barb. 412; *In re Pyrofuse Mfg. Co.*, 20 Ill. 349; *In re Indiana*, 15 Ill. 47; *Pr. 7*, 8 C. 2nd ed. 100; *In re W. C. Co.*, 10 Ill. 41; *Pr. 394*, notes; *Fisher v. World etc. Ins. Co.* 51 A. 1; N. S. 3; *M. v. British etc. Ins. Co.* 9 Abb. Pr. N. S. 1-6; *Ass. C. Co.* 51 N. S. 1; *Mass. Gen. Stat. ch. 68, §§ 35-39*; *In re Franklin Tel. Co.*, 113 Mass. 447; *Pa. Brightley's Parlor & Digest*, 197; *Ohio, Act of May 1 1852*, 111 Rev. Stat. 577, § 25; *Iowa Code*, § 1074.

§ 574. Sundry circumstances which do not per se work a dissolution—Resignation of officers—Failure to elect successors—*Et cetera*.—The failure of trustees or directors of a corporation to hold meetings does not work a dissolution;¹ nor is its existence terminated by the resignation of all its officers.² Neither is a company dissolved by the failure of the stockholders to elect officers at the times prescribed by charter or statute;³ nor by the abandonment of their trust by those in office before the election of their successors.⁴ In such a case the corporate rights and franchises are merely dormant until other officers are elected.⁵ Where, however, the stockholders refuse to elect successors, a receiver may be appointed,⁶ and a winding-up decreed.⁷ A company is not dissolved by the failure of its shareholders to hold annual meetings during a period of ten years,⁸ nor by the stockholders and directors considering and treating the corporation as defunct,⁹ nor by an actual vote of the shareholders to dissolve it, for the purpose of escaping liability.¹⁰

¹ *Phillips v. Wickham*, 1 Paige, 580; *Stee v. Bloom*, 8 Johns. Ch. 306; *B. O. 19 Johns. 456*; 10 Am. Dec. 373; *People v. Rankin*, 9 Johns. 147; *St. Louis etc. Loan Assoc. v. Augustin*, 2 Md. App. 123; *Knowlton v. Ackley*, 8 Osh. 83; *State v. Vincennes University*, 8 Ind. 80, 81; *President &*

Trustees etc. v. Thompson, 29 Ill. 197; *People v. Wren*, 5 Ill. 222. *Cf. Smith v. Smith*, 3 Denau. 557; *Ward v. Sea Ins. Co.* 7 Paige, 224; *People v. Twaddell*, 18 Hun, 497.

2 *Phillips v. Wickham*, 1 Paige, 590, 596; *Boston etc. Manufactory v. Langdon*, 24 Pick. 49; 35 Am. Dec. 292; *Russell v. McLellan*, 14 Pick. 63; *Everts v. Killingworth Manuf. Co.* 20 Conn. 417; *Hoboken etc. Assoc. v. Martin*, 13 N. J. Eq. 427; *Muscatine Turn Verein v. Funck*, 18 Iowa, 469, 472.

3 *Allen v. New Jersey Southern R. R. Co.* 49 How. Pr. 14; *People v. Twaddell*, 18 Hun, 497; *Reilly v. Oglebay* 25 W. Va. 34, 43; *Nashville Bank v. Petway*, 3 Humph. 522; *Harris v. Mississippi Valley etc. R. R. Co.* 51 Miss. 807; *Boston Glass Manuf. Co. v. Landon* 24 Pick. 47; 35 Am. Dec. 292; *Russell v. M. Leno*, 14 Pick. 63; *Everts v. Killingworth Manuf. Co.* 20 Conn. 417; *Hoboken Building etc. Assoc. v. Martin* 13 N. J. Eq. 427; *Commonwealth v. Culen*, 13 Penn. St. 133; 53 Am. Dec. 450; *Rose v. Turpike Co.* 3 Watts, 46; *Lehigh Bridge Co. v. Lehigh Coal Co.* 4 Rawle, 8, 23; 26 Am. Dec. 111; *Cahill v. Kalamazoo etc. Ins. Co.* 2 Doug. (Mich.), 129, 140; 43 Am. Dec. 457; *State v. Vincennes University*, 5 Ind. 80.

4 *People v. Twaddell*, 18 Hun, 497; *Reilly v. Oglebay*, 25 W. Va. 36, 43. *Cf. Smith v. Silver Valley Mining Co.* 64 Md. 85; 84 Am. Rep. 700; S. C. 10 Am. & Eng. Corp. Cas.

5 *Phillips v. Wickham*, 1 Paige, 590. *Cf. Lee v. American etc. Canal Co.* 3 Abb. Pr. N. S. 1.

6 *Lawrence v. Greenwich etc. Ins. Co.* 1 Paige, 587.

7 *Brown v. Union Ins. Co.* 3 La. An. 177, 182; *Curry v. Woodward*, 63 Ala. 373; *Knowlton v. Ackley*, 8 Oush. 63. See *Bruce v. Platt*, 80 N. Y. 379.

8 *State v. Barron*, 55 N. H. 379. See *State v. Vincennes University*, 5 Ind. 80.

9 *Baptist Meeting House v. Webb*, 66 Mo. 306; *Rollins v. Olney*, 33 Mo. 132.

10 *Portland etc. Co. v. Portland*, 12 Mea. B. 77. *Cf. Polar Star Lodge v. Polar Star Lodge*, 16 La. An. 53.

§ 575. The same subject, continued—Non-user—Death of members—Acquisition of all the stock by a single shareholder.—Ordinarily there is no presumption of surrender from non-user of its franchises by a private corporation.¹ Neither a voluntary cessation of all corporate business,² nor an injunction restraining the corporation from exercising its powers, will have the effect of extinguishing its corporate existence.³ The death of all the members of a corporation having capital stock does not work its dissolution.⁴ If every individual member should die at the same moment, the stock would be distributed according

company may still exist as a corporation after all its property has been disposed of.¹ Accordingly lease, sale or assignment of all the corporate property will not *per se* work a dissolution,² although such an act may lay the foundation for a proceeding to vacate the charter and dissolve the corporation.³ Neither is a corporation dissolved by the mere fact that it has become insolvent;⁴ nor by a decree of insolvency, and an injunction restraining the disposition of its property,⁵ nor by the appointment of a receiver and the sale of its property.⁶ Nor is there any implication of dissolution from a statute creating a new corporation out of the purchasers at the foreclosure sale.⁷ The shareholders may continue to elect directors,⁸ and the existence of the company continues "for more than one purpose, and certainly for the purpose of collecting and paying its debts."⁹ For the corporation, notwithstanding the proceedings in insolvency, may have assets sufficient to pay all its debts, and then no impediment would exist, before a surrender pursuant to law, or a forfeiture ascertained and declared by a proper judicial proceeding, to its resuming business.¹⁰ Or if its capital is impaired or wholly gone, this seems to be no reason, before surrender or forfeiture, to prevent the members from furnishing new capital, and then proceeding to use the corporate powers.¹¹ But a foreclosure sale of all the property and franchises of a corporation will terminate the entire interest of the shareholders therein.¹²

¹ Troy etc. R. R. Co. v. Kerr, 17 Barb. 581; Kincaid v. Dwinelle, 59 N. Y. 548; Moseby v. Burrow, 52 Tex. 396; Rollins v. Clay, 53 Me. 132; Kansas City Hotel Co. v. Sauer, 65 Mo. 279; State v. Merchant, 37 Ohio St. 251; De Camp v. Aylward, 52 Ind. 448; Reichwald v. Commercial Hotel Co. 106

Ill. 439; *Bruffet v. Great Western R. R. Co.* 25 Ill. 353; *New Jersey Zinc Co. v. New Jersey Franklinite Co.* 13 N. J. Eq. 322; *Russell v. McLellan* 14 Pick. 63; *Sullivan v. Triunfo etc. Co.* 39 Cal. 459; 2 *Kent's Commentaries* 249. A sequestration of the property held not to amount to a dissolution. *Mann v. Pentz*, 3 N. Y. 415; *Huguenot National Bank v. Studwell*, 6 Day 13, reversed on another point, 74 N. Y. 621.

2 *Troy etc. R. R. Co. v. Kerr*, 17 Barb. 581; *Barclay v. Talman*, 4 Edw. Ch. 123, 129; *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279; *Rollins v. Clay* 33 Me. 132; *De Camp v. Aylward*, 52 Ind. 468; *Richwald v. Commercial Hotel Co.* 106 Ill. 439.

3 *Barclay v. Talman*, 4 Edw. Ch. 123, 129.

4 *Moran v. Sydecker*, 27 Hun. 582; *Nimmons v. Tappan*, 2 Sweeny 652; *New York etc. Works v. Smith*, 4 Duer, 352; *Germantown Passenger R'y Co. v. Fidler*, 60 Pa. St. 124, 132; 100 Am. Dec. 546.

5 *Second National Bank v. New York etc. Manufacturing Co.* 11 Fed. Rep. 532; *S. P. Coburn v. Boston etc. Manufacturing Co.* 10 Gray, 245; *Moseby v. Burrow*, 52 Tex. 396.

6 *National Bank v. Insurance Co.* 104 U. S. 54; *Second National Bank v. New York etc. Manuf. Co.* 11 Fed. Rep. 532; *Mann v. Pentz*, 3 N. Y. 415; *Bank of Bethel v. Pahquisque Bank*, 14 Wall. 383; *State v. Merchant*, 5 Ohio St. 251. Cf. *Osgood v. Maguire*, 61 N. Y. 524, 528.

7 *Wilmington etc. R. R. Co. v. Downward* (1888), 4 R'y & Corp. Law J. 234.

8 *State v. Merchant*, 37 Ohio St. 251.

9 *Smith v. Gower*, 2 Duval, 17. Acc. *State v. Rives*, 5 Ired. 297; *Bruffet v. Great Western R. R. Co.* 25 Ill. 353.

10 *Coburn v. Boston etc. Manuf. Co.* 10 Gray, 245.

11 *Coburn v. Boston etc. Manuf. Co.* 10 Gray, 245.

12 *Vatable v. New York etc. R. R. Co.* 96 N. Y. 49; *Thornton v. Washash R'y Co.* 81 N. Y. 462, 467. Cf. *Sullivan v. Portland etc. R. R. Co.* 96 U. S. 806; *Mickles v. Rochester City Bank*, 11 Paige, 111, 127; 42 Am. Dec. 103; *Cook on Stock and Stockh.* § 633.

§ 577. Dissolution by expiration of charter.—

The existence of ordinary business corporations is sometimes limited by charter to a term of years, and if there be no saving clause, when the term expires, the corporation is *ipso facto* dissolved. It is not necessary that there should be a judicial decree of dissolution.¹ It is provided by statute in New York that the existence of any railway company may be extended, by filing with the secretary of State a certificate of the consent of the holders of two thirds of the stock, signed by them and acknowledged before some officer authorized to take acknowledgments of deeds.² A general statute

limiting the duration of a corporate existence does not apply to corporations whose charters specify a different period of existence. In reckoning the duration of corporate existence, the word "until" in connection with a date is exclusive of the day named; and a corporation which is to exist until January 1st of a certain year, expires on December 31st of the year before.⁴

1 Greely v. Smith, 3 Story, 657; Sturges v. Vanderbilt, 73 N. Y. 384, 390; People v. Walker, 17 N. Y. 502; Bank of Gallipolis v. Trimble, 6 Mon. B. 599; Ashville Division v. Aston, 92 N. C. 578; Bank of Mississippi v. Wrenn, 11 Miss. 791; Eagle Chair Co. v. Kelsey, 23 Kan. 632, 635; Krutz v. Paola Town Co. 20 Kan. 397. See *Merrill v. Suffolk Bank*, 31 Me. 57; 50 Am. Dec. 649. Cf. *Taylor v. Earle*, 8 Hun, 1; *Frothingham v. Barney*, 6 Hun, 386; *McVicker v. Ross*, 55 Barb. 247.

2 N. Y. Laws of 1866, ch. 397, § 5, as amended by N. Y. Laws of 1874, ch. 240.

3 *Steadman v. Merchants' etc. Bank*, 69 Tex. 50.

4 *People v. Walker*, 17 N. Y. 502.

§ 578. Dissolution by surrender of charter.—

Dissolution of the corporate existence may be effected by a voluntary surrender of the charter.¹ This is generally described as an inherent right, which would necessarily defeat any attempt by legislation to enforce upon a corporation qualities of perpetuity.² But there is an exception to the rule with respect to corporations of a *quasi*-public character, such as railway companies, which owe certain duties to the public in return for the extraordinary privileges conferred upon them by the State. Companies occupying this position cannot relieve themselves of those duties by a dissolution and transfer of their franchises, without the consent of the State,³ although of course a railway will not be required to continue its business at a loss.⁴ When the further prosecution of business becomes unprofitable or impracticable, a corporation may be dis-

§ 579. Of the authority and duty of directors respecting surrender.—The directors of a corporation can take no steps toward effecting a dissolution without express authority from the shareholders.¹ For boards of directors are agents of the corporation to manage its affairs, and carry out the purpose and object of its formation, and not to inflict upon it political death.² And what the directors cannot do directly they cannot effect indirectly by conveying and disposing of property of the corporation which is essential to the continuance of its business.³ When, however, dissolution has been determined upon by the shareholders, the directors and officers are the proper persons to carry the resolution into effect.⁴

1 *Abbot v. American etc. Co.* 33 Barb. 578; *Buford v. Keokuk etc. Packet Co.* 3 Mo. App. 159.

2 *Abbot v. American etc. Co.* 33 Barb. 578, 591.

3 *Abbot v. American etc. Co.* 33 Barb. 578; *Buford v. Keokuk etc. Packet Co.* 3 Mo. App. 159, 166; *Black v. Delaware etc. Canal Co.* 24 N. J. Eq. 455; *Kean v. Johnson*, 9 N. J. Eq. 401.

4 *Hancock v. Holbrook*, 9 Fed. Rep. 363; *Marr v. Union Bank*, 4 Cold. 184; *Treadwell v. Salisbury Manuf. Co.* 7 Gray, 393; 66 Am. Dec. 490; *In re Suburban Hotel Co.* Law B. 2 Ch. 737; *In re Factage Parisien*, 34 Law J. Ch. 140; S. C. 13 Week. R. 214, 330; *Bank of Switzerland v. Bank of Turkey*, 5 Law T. N. S. 549.

§ 580. Acceptance of surrender by the State. The surrender of a charter can only be made by some formal solemn act of the corporation, and will be of no avail until accepted by the government. There must be the same agreement of the parties to dissolve that there was to form the compact. It is the acceptance which gives efficacy to the surrender.¹ Even the unanimous consent of the shareholders is not sufficient to dissolve a corporation without acceptance of the surrender by the State.² Merely notifying the executive of the government that a dissolution has been made, is not sufficient to effect.

1 the companies entering into the agreement,¹ it by no means the necessary result. Whether it or no, depends mainly upon the construction of the particular statute under which the consolidation is effected.² But dissolution cannot be effected indirectly by consolidation against the will of a dissenting shareholder, when it could not be effected directly by a winding-up.³ When a corporation is dissolved for the purpose of consolidation with another, shareholders who do not desire to become members of the consolidated company, are entitled to receive the value of their shares in money; and they may enjoin the transaction until the payment be secured to them.⁴ They cannot be compelled to accept the stock of the consolidated company.⁵ So, it is decided that a lease of the corporate property and franchises, with a reservation of rental to be distributed as dividends among the shareholders, is not legal as against dissenting shareholders, unless provision be made for paying them the value of their stock in cash.⁶ The dissolving company may, however, accept in payment for its property and franchises, the stock of the consolidated company, if it be marketable and readily convertible into money for the purpose of distribution among those of its shareholders who are unwilling to accept the shares themselves.⁷

1 *Clearwater v. Meredith*, 1 Wall. 25, 40; *Powell v. North Missouri R. R. Co.* 42 Mo. 63; *McMahan v. Morrison*, 18 Ind. 172; 79 Am. Dec. 418; *State v. Bailey*, 16 Ind. 46; 73 Am. Dec. 405; *Racine etc. R. R. Co. v. Farmers' Loan & Trust Co.* 49 Ill. 331, 349; 95 Am. Dec. 595.

2 *Vide supra*, § 543.

3 *Lauman v. Lebanon Valley R. R. Co.* 30 Pa. St. 42; 72 Am. Dec. 685; *Zabriskie v. Hackensack etc. R. R. Co.* 18 N. J. Eq. 178; 90 Am. Dec. 617; *Kean v. Johnston*, 9 N. J. Eq. 407.

4 *Kelly v. Mariposa etc. Co.* 4 Hun, 632; *Black v. Delaware etc. Canal Co.* 24 N. J. Eq. 455; 30 N. J. Eq. 130; *Lauman v. Lebanon Valley R. R. Co.* 30 Pa. St. 42; 72 Am. Dec. 685; *In re United Ports Ins. etc. Co.* *Law*

the ground that it is a losing concern, without conclusive evidence that its success is impossible.⁴ But the minority of a failing concern may obtain a decree of dissolution.⁵ Even a single shareholder may in that case maintain proceedings to dissolve the corporation.⁶ If future success be proven to be impossible, a decree of dissolution will be granted, notwithstanding that its managers, drawing large salaries, may strenuously oppose a discontinuance of business until the last penny of its resources be exhausted.⁷ Under the New York Code of Civil Procedure, "if a majority of the directors, trustees, or other officers, having the management of the concerns of a corporation created by or under the laws of the State, discover that the stock, effects and other property thereof are not sufficient to pay all just demands, for which it is liable, or to afford a reasonable security to those who may deal with it, or if, for any reason, they deem it beneficial to the stockholders that the corporation should be dissolved, they may present a petition to the supreme court, or to a superior city court of the city where the principal office of the corporation is located, praying for a final order dissolving the corporation, as prescribed in this title."⁸

1 *Mickles v. Rochester City Bank*, 11 Paige, 118, 126; 42 Am. Dec. 103.

2 That is, other than judgment creditors: *Cole v. Knickerbocker etc. Ins. Co.* 23 Hun, 255. *Cf.* *Belknap v. North America etc. Ins. Co.* 11 Hun, 282.

3 *Paulsen v. Van Steenburgh*, 65 How. Pr. 342; *Cole v. Knickerbocker etc. Ins. Co.* 23 Hun, 255; *Belknap v. North America etc. Ins. Co.* 11 Hun, 282.

4 *Pratt v. Jewett*, 9 Gray, 34; *In re Suburban Hotel Co.* Law R. 2 Ch. 737. See, in this connection, *Gilman v. Greenpoint Sugar Co.* 4 Lans. 483; *Fountain Ferry etc. Co. v. Jewell*, 8 Mon. B. 140; *In re London Suburban Bank*, Law R. 6 Ch. 641; *In re Joint Stock etc. Co.* Law R. 8 Eq. 146. *Cf.* *In re Pyrolusite Manganese Co.* 29 Hun, 429; *Denike v. New York etc. Co.* 80 N. Y. 599.

5 *Masters v. Eclectic etc. Ins. Co.* 6 Daly, 455; *Marr v. Union Bank*, 4 Cold. 484; *In re Factage Parisien (Limited)*, 34 Law J. Ch. 140; S. C. 13 Week. R. 214, 530; *In re Great Northern etc. Mining Co.* 17 Week. R. 462

6 *Ward v. Sea Ins. Co.* 7 Paige, 294; *Pratt v. Jewett*, 9 Gray, 34; *In re Suburban Bank*, Law R. 7 Ch. 641; *In re Suburban Hotel Co.* Law R. 1 Ch. 737, 750; *In re Joint Stock etc. Co.* Law R. 8 Eq. 146; *Cramer v. Bird*, Law R. 6 Eq. 143. But see *Curien v. Santini*, 16 La. An. 27; *Polar Star Lodge v. Polar Star Lodge*, 16 La. An. 53; and *Cook on Stock & Stock* § 632.

7 *Marr v. Union Bank*, 4 Cold. 484. *Acc.* *In re Tumacacori Mining Co.* Law R. 17 Eq. 534; *In re Factage Parisien (Limited)*, 34 Law J. Ch. 141. *Cf.* *Masters v. Eclectic etc. Ins. Co.* 6 Daly, 455.

8 N. Y. Code Civ. Proc. § 2419; *In re Importers' etc. Exchange*, N. Y. Ct. of Com. P. (1888); 4 R'y & Corp. Law J. 393, construing this section.

§ 583. Grounds upon which creditors and shareholders may obtain a dissolution. — The distinction between the grounds sufficient to warrant the dissolution of a corporation at the suit of its shareholders or creditors, and the grounds upon which the State may institute proceedings to forfeit or vacate its charter, should be borne in mind. There are many circumstances under which the State might interfere, yet where, if it waive its right to enforce a forfeiture, the shareholders or corporate creditors may not question its exercise of discretion. The insolvency of a corporation, however, is one of the grounds of forfeiture of a charter by the State,¹ which may also constitute the basis of proceedings on the part of its stockholders or creditors for the purpose of dissolution;² but proceedings in insolvency are not necessarily a ground for a decree of dissolution, for after the payment of its debts, there is no impediment to its acquiring other property and resuming business.³ Such instances, however, are rare. In proceedings to dissolve a corporation upon the ground of insolvency, neither the profits which it may derive in future, nor the liabilities which it may thereafter incur, are to be taken into account.⁴ While a corporation is dissolved by the mere fact that its corporate

officers have resigned, or that their terms have expired, and that they have abandoned their trust before the election of their successors,⁵ yet if the shareholders refuse to elect other officers to serve in their stead, this will constitute a ground for proceedings to dissolve the corporation.⁶ It has been held that, although the corporation be inert, and the corporate officers, having become non-residents, have ceased to carry on the business, it is not competent for a minority of the shareholders to institute proceedings for the appointment of a receiver and a distribution of the corporate assets.⁷ The misconduct of corporate officers will not enable a minority of the shareholders to maintain proceedings looking to a dissolution of the company, where the rights of innocent shareholders would be prejudiced thereby.⁸ Failure to comply with the statutory directions with respect to calling the first meeting of shareholders is not a ground for dissolution.⁹

1 *Vide infra*, § 585.

2 *Barclay v. Talman*, 4 Edw. Ch. 123, 129.

3 *Coburn v. Boston etc. Manuf. Co.* 10 Gray, 245. *Vide supra*, § 576.

4 *In re Tumacacori Mining Co.* Law R. 17 Eq. 534; *In re European Life Assurance Society*, Law R. 9 Eq. 122; *In re Suburban Hotel Co.* Law R. 2 Ch. 737. See, also, *In re Factage Parisien*, 34 Law J. Ch. 140; S. O. 13 Week. R. 214, 330; *In re Great Northern etc. Mining Co.* 17 Week. R. 462. *Cf. Masters v. Eclectic etc. Ins. Co.* 6 Daly, 455; *Hardon v. Newton*, 14 Blatchf. 376; *Hugh v. McRae*, Chase's Dec. 466.

5 *Vide supra*, § 574.

6 *Bruc v. Platt*, 80 N. Y. 379; *Curry v. Woodward*, 53 Ala. 375; *Brown v. Union Ins. Co.* 3 La. An. 177, 182; *Knowlton v. Ackley*, 8 Cush. 93.

7 *Cook on Stock and Stockh.* § 632; *Croft v. Lumpkin etc. Mining Co.* 61 Ga. 465. See, however, *Verplank v. Mercantile Ins. Co.* 1 Edw. Ch. 84.

8 *Hardon v. Newton*, 14 Blatchf. 376; *People v. Albany etc. R. R. Co.* 55 Barb. 341; *Fisk v. Chicago etc. R. R. Co.* 53 Barb. 513; *Belmont v. Erie R'y Co.* 52 Barb. 637, 666; *Waterbury v. Merchants' etc. Express Co.* 50 Barb. 157; *Baker v. Backus*, 32 Ill. 79.

9 *Braintree Water Supply Co. v. Town of Braintree*, 146 Mass. 482.

§ 584. **Dissolution by forfeiture.**—When there has been a willful misuser or non-user of the c

porate franchises, or a neglect to comply with the fundamental provisions of the contract between the corporation and the State, the latter may institute proceedings to forfeit and vacate the charter of the corporation.¹ But it is not every failure to perform the duties imposed upon a corporation that will work a forfeiture of its franchise. There must be some plain abuse of power, by which the corporation fails to fulfill the design and purpose of its organization, and the acts of misuser or non-user must relate to matters which are of the essence of the contract between the State and the corporation, and they must be willful and repeated.² A single act of willful non feissance may be a ground of forfeiture, but an isolated instance of non-feissance, not willfully committed nor productive of mischievous consequences, is not sufficient.³ The willful acts of corporate officers are imputed to the corporation,⁴ unless they act against the instructions of the directors.⁵ The same principles involved in determining the forfeiture of grants to individuals for non-performance of conditions are applied to the forfeiture of grants to a corporation.⁶ A reasonable and substantial performance of the conditions is all that is necessary to defeat a claim of forfeiture.⁷ It is not necessary for the State to show that the corporation was actuated by bad motives in failing to perform a condition.⁸ A corporation cannot by subsequent good behavior make amends for past delinquency.⁹ The franchises themselves are not destroyed by a decree of forfeiture, but remain in the State, and may be again conferred upon a similar corporation.¹⁰ When a cause of forfeiture has been established, the court cannot refuse

to give judgment simply because it would injuriously affect public interests.¹¹ The exercise of a franchise, without authority, by a company acting as a corporation, is a continuous usurpation, and the statute of limitations will not run.¹²

1 *People v. Rensselaer Ins. Co.* 33 Barb. 337; *People v. Kingston etc. Co.* 23 Wend. 193, 204; 35 Am. Dec. 551; *State v. New Orleans etc. Co.* 2 Rob. (La.) 529; *Commonwealth v. Commercial Bank*, 28 Pa. St. 283.

2 *Wood's Railway Law*, 1711, citing *Harris v. Mississippi Valley etc. R. R. Co.* 51 Miss. 602; *State v. Pawtuxet etc. Co.* 8 R. I. 182, 521; 94 Am. Dec. 123.

3 *Wood's Railway Law*, 1711.

4 *Ward v. Sea Ins. Co.* 7 Paige, 294; *Bank Commissioners v. Bank of Buffalo*, 6 Paige, 497; *Life etc. Ins. Co. v. Mechanics etc. Ins. Co.* 7 Wend. 31.

5 *Wood's Railway Law*, 1713, 1714.

6 *People v. Kingston etc. Co.* 23 Wend. 193; 35 Am. Dec. 551; *Attorney-General v. Petersburg etc. R. R. Co.* 6 Ired. 456; *Lombard v. Stearns*, 4 Cush. 60; *State v. Royalton etc. Co.* 11 Vt. 431.

7 *Wood's Railway Law*, 1714, citing *Thompson v. People*, 33 Wend. 537; *People v. Kingston etc. Co.* 23 Wend. 193; 35 Am. Dec. 551. And see *Commonwealth v. Allegheny Bridge Co.* 20 Pa. St. 185.

8 *People v. Kingston etc. Co.* 23 Wend. 193; 35 Am. Dec. 551.

9 *People v. Hillsdale etc. Co.* 23 Wend. 254; *Commonwealth v. Turnpike Co.* 5 Cush. 509.

10 *State Bank v. State*, 1 Blackf. 267; 12 Am. Dec. 234.

11 *Wood's Railway Law*, 1715, citing *State v. Pennsylvania etc. Canal Co.* 23 Ohio St. 121.

12 *People v. Stanford*, 77 Cal. 360.

§ 585. **Grounds of forfeiture.**—Failing to comply with the provisions of the incorporating statute, or charter,¹ failing to perform within a reasonable time the express or implied conditions upon which the franchises were granted,² assuming privileges not conferred by the charter,³ constructing and operating a line with other *termini* than those specified in its charter and connecting with a foreign road in violation of law,⁴ keeping the principal office out of the State contrary to the implication of a statute,⁵ or even in the absence of any statute on the subject,⁶ will constitute grounds for forfeiture.

Insolvency is frequently a ground for the forfeiture of the charter of a corporation.⁷ An assignment for the benefit of creditors, together with subsequent failure to meet its obligations, and a suspension of business, have been held to constitute such a ground of forfeiture as admitted no explanation or defense.⁸

1 *State v. Central Ohio etc. Assoc.* 29 Ohio St. 399.

2 *In re Brooklyn etc. R. R. Co.* 75 N. Y. 335; *In re Brooklyn etc. R. R. Co.* 72 N. Y. 245; *Chinleclamouche etc. Co. v. Commonwealth*, 140 Pa. St. 438.

3 *People v. Utica Ins. Co.* 15 Johns. (N. Y.) 353; 8 Am. Dec. 243.

4 *Commonwealth v. Franklin Canal Co.* 21 Pa. St. 117.

5 *State v. Milwaukee etc. R. R. Co.* 45 Wis. 579.

6 *People v. Kingston etc. Co.* 23 Wend. 193; 35 Am. Dec. 551; *State v. Milwaukee etc. R. R. Co.* 45 Wis. 579; *Wood's Railway Law*, 1713.

7 *People v. Bank of Hudson*, 6 Cow. 217; *People v. Washington Bank*, 6 Cow. 210, 216; *Nimmons v. Tappan*, 2 Sweeney, 652; *State v. Bank of South Carolina*, 1 Spear (S. C.) 433, 451, 466; *Commercial Bank v. State*, 14 Miss. 599, 617; *Planters' Bank etc. v. State*, 15 Miss. 163; *State v. Real Estate Bank*, 5 Ark. 595; 41 Am. Dec. 103; *State v. Seneca County Bank*, 5 Ohio St. 171. *Contra, State v. Bailey*, 16 Ind. 46, 51; 79 Am. Dec. 405. *Cf. Ferris v. Strong*, 3 Edw. Ch. 127.

8 *People v. Northern R. R. Co.* 42 N. Y. 217; S. C. 53 Barb. 98. *Cf. People v. Excelsior Gaslight Co.* 8 N. Y. Civ. Proc. Rep. 390.

§ 586. The same subject, continued.—A forfeiture of the franchises of a corporation will be enforced only when the variation from the requirements of its charter are material,¹ where not only the letter but also the spirit of the law has been violated.² No mere intention or purpose in a corporation to violate its duty can constitute a ground of forfeiture.³ Mere accidental negligence, or misuser arising from mistake, is not a ground of forfeiture.⁴ Thus, it has been held that the failure of a railroad company to file a survey and map of its route in the secretary of State's office within the period named in the charter, was not a sufficient ground of forfeiture.⁵ Obtaining a charter from another State and bringing a suit in a federal court

against the corporation first created for the purpose of having an act of legislature of the State by which it was originally incorporated declared void, has been held to constitute a ground of forfeiture⁶

1 *People v. Williamsburgh etc. Co.* 47 N. Y. 513, and cases there cited; *People v. Kingston etc. Co.* 23 Wend. 193; 35 Am. Dec. 551; *People v. Cheeseman*, 7 Colo. 376.

2 *Thompson v. People*, 23 Wend. 585.

3 *Commonwealth v. Pittsburg etc. R. R. Co.* 58 Pa. St. 23, 45.

4 *Harris v. Mississippi Valley etc. R. R. Co.* 51 Miss. 602. But see *People v. Kingston etc. Co.* 23 Wend. 193; 35 Am. Dec. 551.

5 *Wool's Railway Law*, citing *Harris v. Mississippi Valley R. R. Co.* 51 Miss. 602.

6 *Commonwealth v. Pittsburg etc. R. R. Co.* 58 Pa. St. 23, 45.

§ 587. **The same subject, continued—Non-user.** Both misuser and non-user of the corporate powers may be a cause of forfeiture, when the State by its proper officers may proceed to recall the charter, or grant of franchises.¹ While the mere neglect to exercise their franchises by ordinary private corporations is not of itself a sufficient ground of forfeiture,² a similar neglect by corporations of a quasi-public character will constitute a ground of forfeiture. Railway companies having accepted extraordinary franchises from the State, thereby assume certain duties to the public which they are bound to perform, and upon their neglect so to do, those franchises may be revoked.³ Thus, a railway company which has completed its road between the *termini* named in its charter, or articles of association, forfeits its franchises by abandoning or ceasing to operate a part of its road.⁴ But a failure to run regular passenger trains over a branch road on account of travel over the line having been so reduced by the establishment of a competing tramway that operating expenses were greater than gross receipts,

has been held not to be a sufficient ground of forfeiture.⁵ If a company, organized under the New York General Railroad Act of 1850,⁶ fails, within five years after the filing of its articles of association, to begin the construction of its road, and to expend thereon ten per cent. of the amount of its capital, or fails within ten years to complete and put its road in operation, it is enacted that its corporate existence and powers shall cease.⁷ By subsequent acts, however, the periods designated above are extended by two years in favor of any existing corporation which may be unable to construct its road within the time specified.⁸ In a recent case in Iowa it was held that the provisions of the code of that State forfeiting the charter of corporations upon non-user of their franchises during two consecutive years, did not apply to a railway company failing to begin the construction of its road until three years after its incorporation, where in the meanwhile it had made continuous efforts to procure the requisite funds.⁹ Under the provision of the constitution of Illinois,¹⁰ abrogating corporate charters not in operation, it was held that the charter was in operation where all the stock of the corporation had been subscribed for, and a meeting of the corporators had been held, accepting the charter, electing officers, and authorizing contracts.¹¹ Companies duly incorporated by the legislature of Georgia, under the constitution of 1868, did not forfeit their privileges by failing to organize until after the adoption of the constitution of 1877, there being no provision of law to that effect.¹² A substantial relinquishment of the ordinary business of a corporation brings it within the meaning of a

statute declaring a forfeiture for suspension of business. A mere election of directors, and an occasional exercise of corporate functions, will not suffice.¹³

1 *Barclay v. Talman*, 4 Edw. Ch. 123, 129. *Vide supra*, § 34.

2 *Attorney-General v. Bank of Niagara*, Hopk. 354; *University of Maryland v. Williams*, 9 Gill. & J. 315; 31 Am. Dec. 72. But see *Ward v. Sea Ins. Co.* 7 Paige, 294; *In re Jackson etc.* Ins. Co. 4 Sand. Ch. 569.

3 *People v. Albany etc.* R. R. Co. 24 N. Y. 261; 82 Am. Dec. 295; *Silliman v. Fredricksburg etc.* R. R. Co. 27 Gratt. 119, 125; *State v. Railway Co.* 40 Ohio St. 504, 506.

4 *Wood's Railway Law*, 1714, citing *People v. Albany etc.* R. R. Co. 24 N. Y. 261; 82 Am. Dec. 295.

5 *Commonwealth v. Fitchburg R. R. Co.* 12 Gray, 180.

6 N. Y. Laws of 1850, ch. 140.

7 N. Y. Laws of 1867, ch. 775, § 1.

8 N. Y. Laws of 1875, ch. 598, § 1, as amended by N. Y. Laws of 1879, ch. 350; N. Y. Laws of 1882, ch. 405, § 1.

9 *Young v. Webster City etc.* R. R. Co. 75 Iowa, 140.

10 Ill. Const. 1870, art. xi.

11 *McCartney v. Chicago etc.* R. R. Co. 112 Ill. 611.

12 *Atlanta v. Gate City etc.* Co. 71 Ga. 106.

13 *In re Jackson etc.* Ins. Co. 4 Sandf. Ch. 559, 562; *Briggs v. Penniman*, 8 Cow. 387; 18 Am. Dec. 454.

§ 588. The same subject, continued—*Ultra vires* acts—"Trust" associations.—Such *ultra vires* and illegal acts as have been discussed in the chapter on that subject¹ may be made the basis of proceedings on the part of the State to forfeit the charter of a corporation.² In view of the various plans proposed by the holders of railway securities to save themselves from the consequences of ruinous competition, by combination for the maintenance of rates, and the creation in one form or another of a railway "trust," an opinion just handed down by Justice BARRETT of the Supreme Court of New York City may be considered at some length in this connection.³ The case was an action of the State against a business corporation to forfeit its fran-

chises upon the ground that it had exceeded its corporate powers in entering into a combination, or "trust," with various other companies. The foundation of this combination, as of others of like character, rests upon a written agreement, called a "trust deed," providing that all the shares of the capital stock of each company shall be transferred to a board of trustees, to be held by them as joint tenants, subject to the purposes set forth in the deed. These purposes are, in substance, declared to be, to promote economy of administration; to reduce the cost of manufacture, "thus enabling the price of sugar to be kept as low as is consistent with reasonable profit;" to furnish protection against unlawful combinations of labor; to protest against lowering the standard of manufacture; and "generally to promote the interests of the parties hereto in all lawful and suitable ways." The *cestuis que trust* are the entire body of stockholders. In acknowledgment of the shares delivered by them to the trustees, the latter issue what are termed "trust certificates," divided among the several companies in proportion to the value of their respective plants (free from debt), and subdivided by each company among its shareholders in proportion to the stock of the corporation which each *cestui que trust* held prior to the transfer to the trust board. Upon the acceptance of the trust certificates, the original corporate shareholder ceases to hold any further relations with his particular corporation, and thenceforward he is treated as a shareholder in the trust board. He can no longer receive a dividend from his particular corporation; nor, indeed, can the latter ever again declare a dividend. Each

corporation is thereafter bound by a special provision in the deed to pay over the profits arising from its business to the trust board. All the profits are blended into one grand mass, from which dividends are paid by the board to each *cestui que trust*, regardless of the amount of the profits which his particular company may have contributed to the aggregate fund. To obviate the difficulty that the directors and officers of corporations are required by statute to be stockholders thereof,¹ the trust deed further provides that "the said board may transfer from time to time to such persons as it may desire to constitute trustees or directors, or other officers of corporations, so many of the shares as may be necessary for that purpose, to be held by them subject to the provisions of this instrument. Such transfers may be executed by the president and treasurer of the board in behalf of, and as attorneys for, the board for that purpose, and to be retransferred when so requested by the board."

1 Chap. XX, parts II and III.

2 See cases there cited, and also *Pennsylvania R. R. Co. v. St. Louis etc. N. R.* 118 U. S. 290; *Thomas v. Railroad Co.* 101 U. S. 71; *Troy etc. R. R. Co. v. Boston etc. R. R. Co.* 86 N. Y. 107; *Abbott v. Johnstown etc. R. R. Co.* 80 N. Y. 27; 36 Am. Rep. 572; *People v. Albany etc. R. R. Co.* 77 N. Y. 232; *Barclay v. Talman*, 4 Edw. Ch. 123, 129.

3 *People v. North River Sugar Refining Co.* (N. Y. Supr. Ct. Jan. 9, 1889) 5 R'y & Corp. Law J. 56, affirmed by the General Term, Nov. 4, 1889.

4 *Vide supra*, § 458.

§ 589. The same subject, continued—Acts of the shareholders imputed to the corporation.—The defendant plead that the act complained of was the mere individual act of its stockholders, in no wise binding upon it, and at all events a harmless association, constituting nothing more serious than an unusually large partnership. "The first question,

then, to be considered," said the court, "is, whether the corporation, as such, has entered into this combination; for if it has not, clearly it cannot be deprived of its franchises because of independent and several acts, however illegal, of its stockholders. After a minute analysis of the deed of trust and the evidence, the court held that everything pointed irresistibly to the complete practical identity of the shareholders and corporation. From the fact that a dividend had been declared and paid upon the trust certificates, it was manifest that the corporations had so far executed the contract as to pay over to the board the funds from which that dividend had been declared. Further, it appeared that all the capital stock of the corporations had been actually transferred to the trust board, which at once, under the statute, disqualified every director, unless a single share was reserved or transferred to each director under the authority of the clause of the trust deed above quoted. If that was done, and, as these directors had continued to perform their ordinary functions, it must be assumed that it was done, then the deed again became an executed contract, and the directors held their offices, or continued to perform their duties, by the force of its provisions. The contract, claimed to be the act of the individual shareholders, being thus shown to have been executed by the corporation, was manifestly in the first instance an act of the corporation itself. In conclusion, it was said that it is quite impossible to sever the acts of the persons solely interested in these corporations from that of the corporations themselves. The purpose to effect corporate combination cannot be disguised. When the

whole body of stockholders offend the law of the corporate being, they thereby forfeit their franchise, and are to be punished by a decree of forfeiture and dissolution.¹

¹ *People v. North River Sugar Refining Co.* (N. Y. Supr. Ct. Jan. 2, 1839) 5 R'y & Corp. Law J. 59, affirmed by the General Term, Nov. 4, 1839.

§ 590. **Proceedings to forfeit, to be brought in the name of the State.**—Proceedings to forfeit the charter of a corporation can be instituted only by the State;¹ unless there be a statute authorizing private persons to maintain actions for that purpose.² The courts will not decree a forfeiture at the suit of a creditor of the corporation;³ nor can the owner of land condemned for a right of way take advantage of a railroad company's failure to construct its road within the time prescribed by its charter alone.⁴ The Pennsylvania⁵ statute, providing that a bill may be filed in equity by a private citizen for compelling a corporation to prove its authority to act in a particular case, does not empower a private citizen to show a forfeiture of the corporate charter by a mere failure to exercise a franchise granted thereby.⁶

¹ *Buffalo etc. R. R. Co. v. Cary*, 26 N. Y. 75; *Thompson v. New York etc. R. R. Co.* 2 Sand. Ch. 625; *Barclay v. Talman*, 4 Edw. Ch. 123, 129; *State v. Butler*, 15 Lea, 104; *Selma etc. R. R. Co. v. Tipton*, 5 Ala. 787; 39 Am. Dec. 344; *Union Branch R. R. Co. v. East Tennessee etc. R. R. Co.* 14 Ga. 327; *Bayless v. Orne*, Freem. Ch. (Miss.) 173; *Bohannon v. Binns*, 31 Miss. 365; *Chesapeake etc. Canal Co. v. Railroad Co.* 4 Gill & J. 1; *Hamilton v. Annapolis etc. R. R. Co.* 1 Md. Ch. 107; *Day v. Stetson*, 8 Me. 372; *Connecticut etc. R. R. Co. v. Bailey*, 21 Vt. 465; 58 Am. Dec. 181; *Pierce v. Somersworth*, 10 N. H. 369; *Briggs v. Cape Cod etc. Canal Co.* 137 Mass. 72; *Johnson v. Bently*, 16 Ohio, 97; *Receivers v. Renick*, 15 Ohio, 322; *Webb v. Moler*, 8 Ohio, 548.

² *Gaylord v. Fort Wayne etc. R. R. Co.* 4 Biss. 286; *Gilman v. Greenpoint etc. Co.* 4 Lans. 482; *Commonwealth v. Alleghany Bridge Co.* 20 Pa. St. 185; *Baker v. Backus*, 32 Ill. 79.

³ *Gaylord v. Fort Wayne etc. R. R. Co.* 6 Biss. 286.

⁴ *Cincinnati etc. R. R. Co. v. Clifford*, 113 Ind. 460.

⁵ Pa. Act of June 19, 1871.

⁶ *Western Pennsylvania R. R. Co's Appeal*, 104 Pa. St. 390.

§ 591. Of the writs *scire facias* and *quo warranto*.—Forfeiture proceedings may be either by a writ of *scire facias* or of *quo warranto*. The former is appropriate when there is a legal existing body capable of acting, but which has abused its powers; the latter, when the action is against persons who have assumed, without authority or without legal organization under their charter, to act in a corporate capacity.¹ This distinction, however, is not always observed, and proceedings in the nature of *quo warranto* are frequently instituted to remedy not only an illegal assumption of corporate capacity, but also an abuse of corporate powers and franchises.² It is said that *quo warranto* proceedings to dissolve a corporation or declare a forfeiture of its charter, or to oust it from the exercise of franchises which it usurps, “must be brought against the corporation itself, and not merely against its individual members.”³ Such an information against the corporation by name is considered descriptive merely, and not as an affirmation that the defendants are a corporation, but that “using that name they have done the acts in the information alleged.”⁴ But if the information has for its object to test the fact of legal corporate existence, it should be filed against the individuals assuming to act as a corporation; for, it is said, to make the *pseudo* corporation itself the defendant, would be to acknowledge its existence.⁵ In a proceeding to forfeit the franchise of a corporation, and restrain its members from exercising the franchise, an allegation that defendants never had the franchise, is sufficient, without specifying in what respects their right thereto is defective.⁶ But

where a count in a petition prays for the forfeiture of franchises then being exercised by a company of persons acting as a corporation, and alleges that if it ever had, as a corporation, any legal existence, privilege, or franchise, they have become forfeited, the previous existence of the corporation not being alleged, no cause of action is stated.⁷ The attorney-general may proceed of his own motion, without express authority from the legislature.⁸ The court cannot inquire, before granting leave to sue, whether the attorney-general has acted wisely in instituting it, but merely whether he alleges a *prima facie* case of such gravity that it should be judicially determined.⁹ A judgment of forfeiture does not of itself work a dissolution. There must be an execution also for seizure of the franchises, before the penalty takes effect.¹⁰ A decree of dissolution obtained by fraud may be opened and vacated at the suit of a shareholder.¹¹

1 Kent's Commentaries, 313; Ames v. Kansas, 111 U. S. 449; 31 Am. Dec. 72, 111; People v. Utica Ins. Co. 15 Johns. 378; 8 Am. Dec. 249; State v. St. Paul etc. R. R. Co. 35 Minn. 222.

2 Parish of Bellport v. Tooker, 21 N. Y. 267; S. C. 29 Barb. 256; People v. Kingston Turnpike Co. 23 Wend. 193; State v. Milwaukee etc. R. R. Co. 45 Wis. 579; Reed v. Cumberland etc. Canal Co. 65 Me. 132. See, also, cases cited in note to Folger v. Columbia Ins. Co. 96 Am. Dec. 747, 757.

3 State v. Atchison etc. R. R. Co. 24 Neb. 143; 4 R'y & Corp. Law J. 86, 89; citing State v. Taylor, 25 Ohio, 208; People v. Bank, 6 Cow. 217; Mickles v. Rochester City Bank, 11 Paige, 118; 24 Am. Dec. 103, 107; State v. Jefferson Iron Co. 60 Texas 312.

4 People v. Bank, 6 Cow. 217, cited in State v. Atchison etc. R. R. Co. 24 Neb. 143; 4 R'y & Corp. Law J. 86, 89. Contra, People v. Rensselaer etc. R. R. Co. 15 Wend. 115; 30 Am. Dec. 33, and Mud Creek etc. Co. v. State, 43 Ind. 236, which hold that proceeding against the corporation by name is an implied admission of its legal existence.

5 Draining Co. v. State, 43 Ind. 236; Le Roy v. Ousacke, 2 Rolle, 113; "How Corporate Existence Attacked by *Quo Warranto*" (1889), 40 Abb. Law J. 10; People v. Railway Co. 15 Wend. 114; People v. Richardson, 4 Cow. 97; Commonwealth v. Central Passenger R'y Co. 52 Pa. St. 506; People v. Stanford (1888), 77 Cal. 360. But see People v. Flint, 64 Cal. 49.

6 People v. Stanford (1888), 77 Cal. 360.

7 People v. Stanford (1888), 77 Cal. 360.

8 *State v. Southern R. R. Co.* 24 Tex. 80; *People v. Stanford* (1885, 77 Cal. 360.

9 *In re Application of Attorney-General* (1899), 3 N. Y. Suppl. 464, construing the phrase "upon leave granted" in N. Y. Code Civ. Proc. § 1798.

10 *Nevitt v. Bank of Port Gibson*, 14 Miss. 513.

11 *State v. Phoenix Bank*, 33 N. Y. 9, 27; *Chappel v. Chappel*, 12 N. Y. 215; 61 Am. Dec. 496; *People v. Ulster Com. P.* 18 Wend. 628; *Young v. Drake*, 8 Hun. 61; *Denton v. Denton*, 41 How. Pr. 221; *People v. New York*, 19 How. Pr. 289; *Bridenbacker v. Mason*, 16 How. Pr. 203; *Cleveland v. Potter*, 10 Abb. Pr. 497; *People v. Hectograph Co.* 10 Abb. N. Cas. 38; *Lowber v. New York*, 5 Abb. Pr. 48; S. C. 28 Earb. 253; *Stilwell v. Carter*, 2 Abb. N. Cas. 238; *Martin v. Martin*, 3 Barn. & Adol. 934. Cf. *Brownson v. Lacrosse etc. Ry Co.* 2 Wall. 233; *Mussina v. Goldthwaite*, 34 Tex. 125; 7 Am. Rep. 281.

§ 592. Forfeiture not to be collaterally pleaded.
An act constituting a ground of forfeiture of the charter of a corporation cannot be plead collaterally in a suit between the corporation and an individual;¹ for the State may waive its right to enforce the penalty, and it cannot be known in any collateral proceeding, but that it may elect so to do.² Accordingly, until forfeiture has been judicially declared, the corporation is not deprived of any of its powers, franchises,³ or rights of contract;⁴ neither is it relieved of any of its obligations;⁵ not even though the charter may provide for an *ipso facto* forfeiture.⁶

1 *Atlanta v. Gate City etc. Co.* 71 Ga. 106; *Ashville Division v. Aston*, 92 N. O. 578; *Mississippi etc. R. R. Co. v. Cross*, 20 Ark. 443; *Hammett v. Little Rock etc. R. R. Co.* 20 Ark. 204; *Taggart v. Western Maryland R. R. Co.* 24 Md. 563; 89 Am. Dec. 760; *Hamilton v. Annapolis etc. R. R. Co.* 1 Md. Ch. 107; *Barren Creek etc. Co. v. Beck*, 99 Ind. 247; *Briggs v. Cape Cod etc. Canal Co.* 137 Mass. 72.

2 *Frost v. Frostburgh etc. Co.* 24 How. 278.

3 *Barclay v. Talman*, 4 Edw. Ch. 123, 129; *Penobscot Boom Co. v. Lamson*, 16 Me. 224; 33 Am. Dec. 656.

4 *Buffalo etc. R. R. Co. v. Cary*, 26 N. Y. 75; *Mechanics etc. Assoc. v. Stevens*, 5 Duer, 676; *Hughes v. Bank of Somerset*, 5 Litt. 45; *Connecticut etc. R. R. Co. v. Bailey*, 24 Vt. 465; 58 Am. Dec. 181; *Waterford etc. Ry Co. v. Dalbiac*, 6 Ex. 443.

5 *Commonwealth v. Worcester etc. Co.* 3 Pick. 227.

6 *Atchafalaya Bank v. Dawson*, 13 La. 497. But see *Brooklyn etc. Transit Co. v. Brooklyn*, 78 N. Y. 524. See, also, *In re Brooklyn etc. R. Co.* 72 N. Y. 245.

§ 593. Waiver—The State may waive its right to enforce a forfeiture—Subsequent recognition of corporate existence.—The State may waive its right to enforce the forfeiture of the franchises and privileges of a corporation.¹ And it is deemed to have done so when, having notice of the fact which constitutes the ground of forfeiture, it subsequently enacts a statute which recognizes the existence of the corporation.² For example, the right to declare a charter forfeited, on account of the corporation having been engaged in the transaction of a different business than was authorized by the general law under which it was originally organized, has been held to be waived by the State, by the subsequent enactment of a statute enlarging the corporate powers.³

1 *Atchafalaya Bank v. Dawson*, 13 La. 497; *State v. New Orleans etc. Co.* 2 Rob. (La.) 529; *Chesapeake etc. Canal Co. v. Ohio R. R. Co.* 4 Gill & J. 1, 127; *Frederick etc. Seminary v. State*, 9 Gill, 379; *Commonwealth v. Union etc. Ins. Co.* 5 Mass. 230; 4 Am. Dec. 50.

2 *People v. Manhattan Co.* 9 Wend. 351; *People v. Fishkill etc. Co.* 27 Barb. 445; *State v. Bank of Charlestown*, 2 McMull. 439; 39 Am. Dec. 135; *State v. Mississippi etc. R. R. Co.* 20 Ark. 495; *Lumpkin v. Jones*, 1 Kelly, 27; *Commonwealth v. Union etc. Ins. Co.* 5 Mass. 230; 4 Am. Dec. 50; *McConahy v. Turnpike Co.* 1 Pa. 426; *Kishacoquillas etc. Co. v. McConahy*, 16 Serg. & R. 140.

3 *People v. Ottawa etc. Co.* 115 Ill. 281.

§ 594. Of the jurisdiction of courts of law and equity—The legislature prohibited from judicial acts.—When the constitution of a State prohibits the legislature from exercising judicial functions, it cannot pass an act forfeiting a charter without the consent of the corporation.¹ But when in a statute reserving to the State the right to repeal all charters subsequently granted, there is a proviso that a certain class of charters shall be forfeited only for cause, a legislative inquiry to ascertain wh

there be grounds for forfeiture, is not a judicial act.¹ Proceedings to forfeit the charter of a corporation must be brought in a court of law.² A court of equity has no jurisdiction, unless it be conferred by statute;³ although equity may hold directors liable for a breach of trust.⁴ Under the New York statutes, the so-called "supreme court" has jurisdiction to dissolve a corporation at the suit of the attorney-general.⁵ Leave to file an information for the purpose of having the charter of a corporation forfeited, is not in the discretion of the court, but must be granted as of course.⁷

1 *University of Maryland v. Williams*, 6 Gill & J. 365; 31 Am. Dec. 72; *Bruffet v. Great Western R. R. Co.* 25 Ill. 353.

2 *Wood's Railway Law*, 1716, citing *Crease v. Babcock*, 23 Pick. 334; 34 Am. Dec. 61.

3 *State v. Merchant Ins. etc. Co.* 8 Humph. 235; *President etc. v. Trenton Bridge Co.* 13 N. J. Eq. 46; *Attorney-General v. Stevens*, 1 N. J. Eq. 369; 22 Am. Dec. 526.

4 *Hardon v. Newton*, 14 Blatchf. 376, 378; *Belmont v. Erie R'y Co.* 53 Barb. 637; *Howe v. Deuel*, 43 Barb. 504; *Bayless v. Orne*, 1 Freem. Ch. (Miss.) 161; *Folger v. Columbian Ins. Co.* 99 Mass. 267; 96 Am. Dec. 747; *Strong v. McCagg*, 55 Wis. 624, 627; *French Bank Case*, 53 Cal. 435.

5 *Dodge v. Woolsey*, 13 How. 331; *Fountain Ferry etc. Co. v. Jewell*, 8 Mon. B. 140, 142; *Hodges v. New England Screw Co.* 1 R. I. 312; 53 Am. Dec. 624; *Baker v. Backus*, 32 Ill. 79. But cf. *People v. College of California* 38 Cal. 166.

6 *Denike v. New York etc. Co.* 80 N. Y. 599; *Wilmersdoerffer v. Lake Mahopac etc. Co.* 18 Hun. 387; 2 N. Y. Rev. Stat. 463, § 38; N. Y. Laws of 1870, ch. 151, § 2. Cf. *Attorney-General v. Bank of Chenango*, 1 Hopk. Ch. 596.

7 *Cole v. Dyer*, 29 Ga. 434; *State v. Southern Pacific R. R. Co.* 24 Tex. 80; *Fall River etc. Works v. Old Colony etc. R. R. Co.* 3 Allen, 221.

§ 595. **Dissolution by repeal of charter.**—The learned reader should bear in mind the distinction between the repeal and the forfeiture of charter. The practical importance of the distinction lies in the fact that the former is a legislative act of the State,¹ the latter a judicial act of the State;² the former cannot be accomplished without impairing

the obligation of the contract between the sovereign and the corporation, unless the right has been reserved in the constitution of the State, or in some previously enacted general law, or in the charter itself;³ the latter may be accomplished without a reservation of that right;⁴ the former lies in the discretion, it might be almost said the *caprice*, of the legislature;⁵ the latter is a penalty to be inflicted only for cause.⁶

1 *Greenwood v. Union Freight R. R. Co.* 105 U. S. 13; *Lothrop v. Stedman*, 13 Blatchf. 134; *Myrick v. Brawley*, 33 Minn. 377; and cases cited *infra*, § 594.

2 *Vide supra*, § 592, and cases cited *infra*, note 6.

3 *Miller v. State*, 15 Wall. 478; *New Orleans etc. Co. v. Louisiana etc. Co.* 115 U. S. 750; *Greenwood v. Union Freight R. R. Co.* 105 U. S. 13; *Sinking Fund Cases*, 99 U. S. 700, 737; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Miller v. State*, 15 Wall. 478; *Fletcher v. Peck*, 6 Cranch, 27; *Port of Mobile v. Louisville etc. R. R. Co.* 84 Ala. 115; *State v. Northern Central R'y Co.* 44 Md. 131, 164; *Wales v. Stetson*, 2 Mass. 143; 3 Am. Dec. 39; *Stevens v. Rutland etc. R. R. Co.* 29 Vt. 545; *Lothrop v. Stedman*, 42 Conn. 583; *Zabriskie v. Hackensack etc. R. R. Co.* 13 N. J. Eq. 178; 90 Am. Dec. 617.

4 *Vide supra*, § 585.

5 *Greenwood v. Union Freight R. R. Co.* 105 U. S. 13; *Myrick v. Brawley*, 33 Minn. 377; and cases cited in the following section.

6 *Vide supra*, § 584-589; *Miller v. State*, 15 Wall. 478; *Campbell v. Mississippi Union Bank*, 7 Miss. 625, 653; *State v. Northern Central R'y Co.* 44 Md. 131, 164.

§ 596. **The same subject, continued.**—The constitution of New York reserves to the legislature the right to alter from time to time or repeal any general or special act relating to the formation of corporations;¹ and the General Railroad Act of 1850 in that State reserves to the legislature the right at any time to annul or dissolve any company incorporated under the act; with the proviso, however, that the dissolution shall not take away or impair any remedy against the corporation, its stockholders, or officers, for any liability previously incurred.²

When the State has reserved the right of repeal, the legislature may exercise it without assigning any reason therefor; and the validity of its action does not depend upon the necessity for it, nor upon the soundness of any reasons which may be alleged as promoting it.³ Where a charter provides that, upon a failure to comply with any of its conditions, it shall be subject to alteration or repeal by the legislature, it is not essential that there be a judicial determination of the fact of failure before the legislature can act.⁴ The reserved power of repeal may be exercised by the State summarily and at will, and its action being a legislative and not a judicial act, cannot be reviewed by the courts, unless the exercise of the power be so wanton and causeless as to violate the principles of natural justice.⁵ Unless the right to repeal has been reserved, the legislature cannot, by a subsequent act, render defaults of the corporation an absolute ground of forfeiture, which were only a qualified ground of forfeiture under its charter.⁶ A corporation formed under a general incorporating statute is not affected by the repeal thereof.⁷ But a special charter, it seems, may be repealed by a general law.⁸ A forfeiture or dissolution can be declared only by the courts of the State from which the corporation derived its charter.⁹ Accordingly, a court of equity will not try, in a collateral way, the question of a violation of its charter by a foreign corporation.¹⁰ Where the charter of a railway authorizes it to build its tracks through any street or highway, a grant by a city ordinance to the company of the right to use a particular street for that purpose, and to load and unload its freight cars thereon, is a

ranchise derived in fact from the State, through the city as the agent of the State. Accordingly, equity will relieve against an attempt on the part of the city, by a subsequent ordinance, to deprive the railway of the vested right, and it will not be deterred from granting relief by the fact that the ordinance is *quasi-criminal* in character.¹¹

1 N. Y. Const. art. viii, § 1.

2 N. Y. Laws of 1850, ch. 140, § 48.

3 *Greenwood v. Union Freight R. R. Co.* 106 U. S. 13, 17.

4 *Myrick v. Brawley*, 33 Minn. 377.

5 *Lothrop v. Stedman*, 13 Blatchf. 131; S. C. 42 Conn. 563; *McLaren v. Pennington*, 1 Paige. 102; *Mobile etc. R. R. Co. v. State*, 29 Ala. 573; *Western North Carolina R. R. Co. v. Rollins*, 82 N. C. 523; *Thornton v. Marginal Freight R'y Co.* 123 Mass. 32. See *Loan Association v. Topeka*, 20 Wall. 663; *Day v. Savadge*, Hob. 85; *London v. Wood*, 12 Mod. 688.

6 *Powell v. Sammons*, 31 Ala. 552; *Commonwealth v. United States Bank*, 2 Ashm. 349; *Aurora etc. Co. v. Holthouse*, 7 Ind. 59. As to the reservation of power to repeal and amend with the consent of the shareholders, see *Mobile etc. R. R. Co. v. State*, 29 Ala. N. S. 573. See, also, *supra*, CHAPTER II.

7 *Bewick v. Alpena Harbor Co.* 33 Mich. 700; *Danworth v. Coalbaugh*, 5 Iowa, 300.

8 *State v. Commissioners of Taxation*, 37 N. J. 228. Of course, however, only when there has been theretofore reserved the right to repeal.

9 *Society for Propagation of the Gospel v. New Haven*, 8 Wheat. 464; *Importing etc. Co. v. Locke*, 50 Ala. 332, 335; *Wilkins v. Thorne*, 60 Md. 253, 258.

10 *Silver Lake Bank v. North*, 4 Johns. Oh. 370, per Chancellor KENT.

11 *Port of Mobile v. Louisville etc. R. R. Co.* 24 Ala. 115.

§ 597. **Effect of dissolution upon debts, rights of contract, and pending litigation.**—Contrary to the old common-law rule, it is now held that the debts of a corporation are not extinguished by its dissolution, whether it be effected by voluntary surrender or by forfeiture of charter;¹ and proceedings may be instituted in equity to enforce payment when judgment could not be obtained at law.² “A corporation never can dissolve itself so as to defeat any of the just rights of its creditors.”³ Nor can any

statute of a State be so construed as to impair the obligation of contracts between the corporation and its creditors. The latter may still enforce their claims against the corporate assets.⁴ So, on the other hand, debts owing to the corporation are not extinguished by a dissolution or a repeal of its charter. While the corporation may not thereafter sue in its own name,⁵ nevertheless its rights of contract, or *choses in action*, acquired during its lawful existence, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed; and the courts may, if the legislature does not provide an especial remedy, enforce those rights by the means within their power."⁶ Upon this principle, it is held that a lease to a corporation is not terminated by its dissolution.⁷ When the charter of a corporation has been repealed, no legal judgment can be rendered against it.⁸ And the dissolution of a corporation is said to abate pending actions, and to render any judgment thereafter void.⁹ "The attorney for the corporation may well suggest the death of a corporation by plea or otherwise on the record, and if the fact is admitted, the suit as to the corporation will abate by operation of law, and render all further proceedings void,"¹⁰ unless capable of being revived by some statute.¹¹ The creditors' rights, however, are not thereby destroyed, but may be enforced in equity against the corporate property.¹² Neither do the shareholders lose their equitable rights in the *choses in action* of the corporation.¹³ Thus, where the charter of a corporation expired during the pendency of an action brought by it to enforce the payment of a note, the

of directors were allowed to revive and prosecute the action as trustees for those interested.¹⁴

Greenwood v. Union Freight R. R. Co. 105 U. S. 13, 19; *McCoy v. Farmer*, 65 Mo. 244; *Howe v. Robinson*, 20 Fla. 352; *Thornton v. Marginal Freight*, 123 Mass. 32; *Blake v. Portsmouth etc. R. R. Co.* 30 N. H. 433. See *Robertson*, 6 Wall. 277; *Bacon v. Robertson*, 18 How. 480. Cf. *Bacon v. Robertson*, 13 How. 480; *McGoon v. Scales*, 9 Wall. 23; *Robinson v. Lane*, 137; *Hightower v. Thornton*, 8 Ga. 486; 52 Am. Dec. 412; *Fox v. Howard*, Eq. 358; 36 Am. Dec. 48; *Malloy v. Mallett*, 6 Jones Eq. 315; *Robinson v. Moore*, 21 Miss. 157; *Bank of Mississippi v. Duncan*, 53 Me. 173. See, however, *Erie etc. R. R. Co. v. Carey*, 28 Pa. St. 237; *Winter v. Seaber*, 3 Burr. 1866; *Commercial Bank v. Lockwood*, 2 Har.

Bacon v. Robertson, 18 How. 480; *Howe v. Robinson*, 20 Fla. 352, action at law was barred by the statute of limitations; *Folger v. Commonwealth Ins. Co.* 99 Mass. 267, 276.

Brown v. Union Ins. Co. 3 La. An. 177, 182.

Mumma v. Potomac Co. 8 Pet. 281; *Washington etc. Co. v. State*, 19 9.

Bank of Louisiana v. Wilson, 19 La. An. 1. See *Greely v. Smith*, 3 637.

Greenwood v. Union Freight R. R. Co. 105 U. S. 13; *S. P. Thornton v. Marginal Freight R'y Co.* 123 Mass. 32, and cases there cited; *Read v. Fort Bank*, 23 Me. 318. Cf. *People v. National Trust Co.* 12 N. Y. 223.

People v. National Trust Co. 82 N. Y. 283.

Merrill v. Suffolk Bank, 31 Me. 57, 61, 62; 50 Am. Dec. 649.

Grealey v. Smith, 3 Story C. C. 657; *Ingraham v. Terry*, 11 Humph. Cf. *Saltmarsh v. Planters' etc. Bank*, 17 Ala. 761; *Carey v. Giles*, 10 *Merrill v. Suffolk Bank*, 31 Me. 57; 50 Am. Dec. 649.

Grealey v. Smith, 3 Story C. C. 657, 659, per STORY, J

Greely v. Smith, 3 Story C. C. 657.

Greenwood v. Union Freight R. R. Co. 105 U. S. 13; *Curran v. Ards*, 15 How. 304; *Mumma v. Potomac Co.* 8 Pet. 281; *Life Assoc. v. Fash*, 102 Ill. 315, 323.

McCoy v. Farmer, 65 Mo. 244.

McCoy v. Farmer, 65 Mo. 244, 247.

598. The same subject, continued—Of the rights of creditors.—The property of corporations being held in trust for creditors, it may be pursued wherever it may come, as before the dissolution of a company, unless it has passed into the hands of bona-fide purchasers.² Since the claims of creditors are in no way affected by the dissolution of a corporation, a creditor cannot question the right of the State to re-

peal a charter.³ In some of the States, the statutes make the directors and officers of corporations, upon dissolution, trustees of the assets for the benefit of creditors.⁴ And where there has been no fraud the winding-up is not to be taken from the directors and officers to be placed in the hands of a receiver.⁵ But if a receiver be appointed to wind up the affairs of a dissolved corporation, the title to its property vests in him for the purpose of distribution.⁶ The claims of corporate creditors upon the assets after dissolution, as against the rights of shareholders therein, may be barred by the statute of limitations.⁷

1 *Fisk v. Union Pacific R. R. Co.* 10 Blatchf. 518; *Tinkham v. Barr*, 31 Barb. 407.

2 *Fisk v. Union Pacific R. R. Co.* 10 Blatchf. 518.

3 *Read v. Frankfort Bank*, 23 Me. 318.

4 *Central City Savings Bank v. Walker*, 66 N. Y. 424, 428; *Frothingham v. Barney*, 6 Hun, 368, 372; *Towar v. Hale*, 46 Barb. 351, 365; *Pack Town Co. v. Krutz*, 23 Kan. 725, 728. See *Bliss v. Matteson*, 45 N. Y. 22.

5 *Follett v. Field*, 30 La. An. 161.

6 *Bacon v. Robertson*, 18 How. 480; *Heath v. Barmore*, 50 N. Y. 32; *Owen v. Smith*, 31 Barb. 641; *S. P. Towar v. Hale*, 46 Barb. 351; *Life Assoc. v. Fassett*, 102 Ill. 315, 323; *People v. College of California*, 33 Cal. 161.

7 *Johnson v. Talley*, 60 Ga. 540. Cf. *Tracer v. Clewa*, 115 U. S. 522.

§ 599. Of the distribution of assets upon dissolution.—At common law, upon the dissolution of a corporation, its real estate reverted to the grantor, its personalty to the sovereign, and its *choses in action* and debts were extinguished.¹ And a few modern decisions have reluctantly adhered to the old common-law rule.² In New York, lands taken under the right of eminent domain for the construction of canals, revert to the State and not to their original owners, upon an abandonment of the public use.³ So, also, in New York, land taken for public parks reverts to the State.⁴ But ordi-

y, in courts of equity and in the better considerations of courts of law, the common-law has been disregarded, at least so far as regards corporations having capital stock and organized for purposes of gain.⁵ Upon the dissolution of companies of that character, their assets continue to be regarded as a trust fund for the payment of creditors and the surplus remaining, after the satisfaction of all demands against the company, is distributed among the shareholders, in proportion to the amount of stock held by each,⁷ or, rather, in proportion to the amount paid by each upon his shares,⁸ common and preferred shareholders sharing alike,⁹ unless otherwise provided by statute or by contract.¹⁰ Whenever any railway company organized under the laws of New York is dissolved by an act of the legislature, it is the duty of the attorney-general immediately thereafter to bring a suit to wind up and finally settle and adjust its affairs.¹¹ The suit is to be brought in the name of the people of the supreme court in any county which the attorney-general may select.¹² The court is then to appoint a receiver, who shall make inventory of the corporate assets, notify creditors to present their claims, sell the property and pay the debts of the company.¹³

Bingham v. Weiderwax, 1 N. Y. 509; *Owen v. Smith*, 31 Barb. 641; *Porter v. Moore*, 21 Miss. 157; *Hightower v. Thornton*, 8 Ga. 406; 52 Am. 412; *Malloy v. Mallett*, 6 Jones Eq. (N. C.) 345; *State v. Rives*, 5 Ired. 412; *Fox v. Horah*, 1 Ired. Eq. 353; 33 Am. Dec. 48; *White v. Campbell*, 5 Mich. 38; *Commercial Bank v. Lockwood*, 2 Har. (Del.) 8; *Miami etc. Co. v. State*, 13 Ohio St. 263; *State Bank v. State*, 1 Blackf. (Ind.) 237; *Life Insurance Co. v. Fasset*, 102 Ill. 315; 12 Am. Dec. 234; *Angell & Ames on Corporations*, § 779; *Co. Litt.* 13 b. See, also, *King v. London*, 8 Howell's State Trials, 1087; *Attorney-General v. Lord Gower*, 9 Mod. 224; *King v. Paschal*, 3 Term Rep. 197; *Coulter v. Robinson*, 24 Miss. 278; 57 Am. Dec. 277; *Cf.* with this case, *Bacon v. Robertson*, 18 How. 480; *Lum v. Robertson*, 15 How. 277; *Curran v. State*, 15 How. 304.

Acklin v. Paschal, 48 Tex. 147; *Bank of Mississippi v. Duncan*, 56

Miss. 168; Coulter v. Robertson, 24 Miss. 278; 57 Am. Dec. 168; St. Philip's Church v. Zion etc. Church, 23 S. C. 297; Hopkins v. Whitesides, 1 Head, 31; St. Philip's Church v. Zion etc. Church, 23 S. C. 793; State v. Rives, 5 Ired. 297. Cf. Hopkins v. Whitesides, 1 Head, 31. But see Erie etc. R. R. Co. v. Casey, 26 Pa. St. 287.

3 *Rexford v. Knight, 11 N. Y. 308, affirming S. C. 15 Barb. 627; Cook on Stock & Stockh. § 638; Plitt v. Cox, 43 Pa. St. 486. Cf. Commonwealth v. Fisher, 1 Pen. & W. (Pa. Rep.) 462. The rule is contra, however, in North Carolina: State v. Rives, 5 Ired. 297.*

4 *De Varaigne v. Fox, 2 Blatchf. 95; Brooklyn Park Commissioners v. Armstrong, 45 N. Y. 234; 6 Am. Rep. 70, reversing S. C. 3 Lans. 429; Heyward v. New York, 7 N. Y. 314; Dingley v. Boston, 100 Mass. 544; Halde-man v. Pennsylvania R. R. Co. 50 Pa. St. 425.*

5 *Lum v. Robertson, 6 Wall. 277; Bacon v. Robertson, 18 How. 480; Mumma v. Potomac Co. 8 Pet. 281; Lothrop v. Stedman, 13 Blatchf. 134; Heath v. Barmore, 50 N. Y. 302; Bingham v. Weidewax, 1 N. Y. 509; In re Woven Tape Skirt Co. 8 Hun. 508; N. Y. Laws of 1876, ch. 442; Robinson v. Lane, 19 Ga. 337; Curry v. Woodward, 53 Ala. 371; Fox v. Horah, 1 Ired. Eq. 358; 36 Am. Dec. 48; Read v. Frankfort Bank, 23 Me. 318; Blake v. Portsmouth etc. R. R. Co. 39 N. H. 435; Newfoundland R'y Construction Co. v. Schack, 40 N. J. Eq. 222. See Hamilton v. Accessory Transit Co. 26 Barb. 416; Commonwealth v. Boston, 9 Gray, 451.*

6 *Lum v. Robertson, 6 Wall. 277; Wood v. Dummer, 3 Mason, 308; Powell v. North Missouri R. R. Co. 42 Mo. 63. See Murray v. Vanderbilt, 39 Barb. 140.*

7 *Krebs v. Carlisle Bank, 2 Wall. C. C. 33; Wood v. Dummer, 3 Mason, 308, 322; Burrall v. Bushwick R. R. Co. 75 N. Y. 211; Heath v. Barmore, 50 N. Y. 302; Frothingham v. Barney, 6 Hun. 366; James v. Woodruff, 10 Paige, 541; Dudley v. Price, 10 Mon. B. 84. See Fish v. Nebraska City etc. Co. 25 Fed. Rep. 795. Cf. Thornton v. Margins, Freight R'y Co. 123 Mass. 32; Nathan v. Whitlock, 9 Paige, 152; Lea v. American Atlantic etc. Canal Co. 3 Abb. Pr. N. S. 1; Curren v. State, 15 How. 304, 307; Hastings v. Drew, 76 N. Y. 9, affirming S. C. 50 How. Pr. 254; Wilde v. Jenkins, 4 Paige, 481.*

8 *Krebs v. Carlisle Bank, 2 Wall. C. C. 33; N. Y. Rev. Stat. ch. 181, art. 3, § 83; In re Bridgewater Navigation Co. (Limited), (Ch. Div. 1887), 3 R'y & Corp. Law J. 591. Cf. James v. Woodruff, 10 Paige, 541; Purlon v. New Orleans etc. R. R. Co. 3 La. An. 19.*

9 *McGregor v. Home Ins. Co. 33 N. J. Eq. 181; In re London etc. Co. Law R. 5 Eq. 519. See, also, cases cited supra, § 572. But see Griffith v. Paget, 6 Ch. Div. 511, where the dissolution was by consolidation.*

10 *In re Bangor etc. Co. Law R. 20 Eq. 59.*

11 *N. Y. Laws of 1886, ch. 310, § 1.*

12 *It should be remembered that the so-called "Supreme Court" of New York corresponds very nearly to the circuit courts in other States.*

13 *N. Y. Laws of 1886, ch. 310, §§ 2, 3, 4, 5, 6.*

§ 600. The same subject, continued—Of the rights of shareholders.—The right of shareholders to participate in the distribution of corporate assets upon dissolution cannot be taken from them by an act repealing the charter of the corporation.¹ Upon

a dissolution and winding-up, the shareholders are entitled to an immediate settlement of the corporate affairs and distribution of assets.² A stockholder instituting proceedings to recover his portion of the corporate assets upon dissolution, must bring his bill in equity.³ The corporation is a necessary party to an action by a shareholder against the person in whose hands the assets have been placed for distribution.⁴ The law of the State from which the corporation derives its charter controls the rights of its shareholders in the distribution of assets.⁵ A corporation chartered in several States may be dissolved in one of them without affecting its franchises in the others.⁶ A transfer of shares after dissolution is merely an equitable assignment of the shareholder's interest in the corporate assets.⁷

1 *Lothrop v. Stedman*, 13 Blatchf. 134.

2 *Taylor v. Earle*, 8 Hun, 1; *Frothingham v. Barney*, 6 Hun, 366; *McVicker v. Ross*, 55 Barb. 247.

3 *Brown v. Adams*, 5 Biss. 181. *Cf. Pacific R. R. Co. v. Outting*, 27 Fed. Rep. 638.

4 *Young v. Moses*, 53 Ga. 628.

5 *Hamilton v. Accessory Transit Co.* 26 Barb. 46.

6 *Hart v. Boston etc. R. R. Co.* 40 Conn. 524. *Cf. Graham v. Boston etc. R. R. Co.* 118 U. S. 161; *Covington etc. Bridge Co. v. Mayer*, 31 Ohio St. 319, 325.

7 *James v. Woodruff*, 10 Paige, 541; S. C. affirmed, 2 Denio, 574; *Bank of Commerce's Appeal*, 73 Pa. St. 59; *Chappell's Case*, Law R. 6 Ch. 902. See *Callanan v. Edwards*, 32 N. Y. 483; *Sewell v. Chamberlain*, 16 Gray, 501.

§ 601. Of a certain qualified existence after dissolution.—After dissolution, a corporation cannot at common law engage in any business transaction, nor by contract incur any obligation or acquire any right; neither can it sue or be sued in a corporate capacity,¹ unless there be statutory provis-

ion for a qualified prolongation of its existence to enable it to settle its affairs.² For that purpose the corporate existence is frequently extended by statutes authorizing and regulating dissolution.³ In Alabama the prolongation is for two years;⁴ in some of the other States, for three years.⁵ But ordinarily the liquidation of the corporate affairs is conducted by a receiver or other officer appointed for that purpose.⁶ When, however, the dissolution has been voluntarily made by a surrender of the charter, the corporation retains full power, so far as necessary, to close up all its affairs, pay off its debts, and distribute its property, and for that purpose the board of directors continues to exist.⁷

1 *Saltmarsh v. Planters' etc. Bank*, 17 Ala. 761; *Bank of Louisiana v. Wilson*, 19 La. An. 1; *Miami Exporting Co. v. Gano*, 13 Ohio, 28; *City Ins. Co. v. Commercial Bank*, 63 Ill. 348; *Muscatine Turn Verein v. Funk*, 13 Iowa, 469; *Wood's Railway Law*, 1715; *Taylor on Corporations*, § 435.

2 *Saltmarsh v. Planters' etc. Bank*, 17 Ala. 761.

3 *McGoo v. Scales*, 9 Wall. 23; *In re Independent Ins. Co.* 1 Holmes 103; *Mason v. Pawabic Mining Co.* 25 Fed. Rep. 832; *Nevitt v. Pack of Port Gibson*, 14 Miss. 513; *Thornton v. Marginal Freight R'y Co.* 123 Mass. 32; *Crease v. Babcock*, 10 Met. 525, 567; *Folger v. Chase*, 18 Pick. 3; *Mariners' Bank v. Sewall*, 50 Me. 220; *Franklin Bank v. Cooper*, 35 Me. 179; *Seaton v. City Bank*, 12 Ohio St. 57; *Muscatine Turn Verein v. Funk*, 13 Iowa, 439; 1 How. Stat. (Mich.) 1241, § 4867. *Cf. Greenwood v. Union Freight R. R. Co.* 105 U. S. 13; *Merrill v. Suffolk Bank*, 31 Me. 57; 50 Am. Dec. 619.

4 *Tuscaloosa etc. Assoc. v. Green*, 48 Ala. 346.

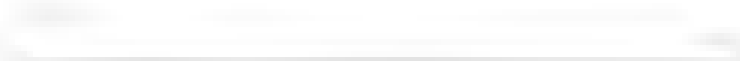
5 *Van Glahn v. De Rossett*, 81 N. O. 467; *Foster v. Essex Bank* 16 Mass. 245; 8 Am. Dec. 135; *Michigan State Bank v. Gardner*, 15 Gray, 32; *Blake v. Portsmouth etc. R. R. Co.* 39 N. H. 435; *Herron v. Vance*, 11 Ind. 595.

6 *Taylor on Corporations*, § 435; *Lothrop v. Stedman*, 13 Blatchf. 134; *Owen v. Smith*, 31 Barb. 641; *Van Glahn v. De Rossett*, 81 N. O. 467.

7 *Irvin v. Oregon etc. Co.* 22 Hun, 598, 539

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